361

4/61
73

45212

S. VOGEL, as Trustee, doing business as RETAILER'S FINANCE CO., Appellant,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
MINNIE A. BRISTOL and the COSMOPOLITAN NATIONAL BANK OF CHICAGO, Appellees.	)	

PETITION FOR REHEARING.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff, S. Vogel, as trustee doing business as Retailer's Finance Co., as holder of a promissory note executed by defendant Minnie A. Bristol obtained a judgment on December 29, 1949 by confession against defendant and on the same day obtained a garnishment summons against the Cosmopolitan National Bank of Chicago as garnishee. On January 11, 1950 defendant filed a petition seeking to have the judgment vacated, alleging in substance that plaintiff was not a holder in due course and setting forth a defense on the merits. On February 8, 1950 defendant filed an additional defense alleging that plaintiff failed to comply with the Assumed Business Name Act (Ill. Rev. Stat. 1949, Chap. 96, par. 4) and therefore had no right to file this suit and obtain judgment.

The trial court sustained defendant's additional defense, vacated the judgment by confession and also dismissed the garnishment proceedings, from which orders plaintiff prosecutes this appeal.

On December 12, 1950 we affirmed the judgment of the trial court upon the theory that noncompliance with the statute precluded plaintiff's suit. On petition for rehearing, which we allowed, plaintiff brought to our attention the case of Grody v. Scalone, 408 Ill. 61, which decision was announced November 27, 1950, wherein the court passed on the exact question involved in this case. The court said at p. 65, that the statute "* * * fixes a penalty for persons conducting a business in violation of the act. To deny recovery in a case, such as the instant case, would be affording a means by which person having received a benefit from another would be enabled to retain it without compensation. A careful examination of the statute before us presents two pertinent facts: (1) That it expressly imposes a penalty for nonobservance in the form of a fine or imprisonment; and (2) that no further penalty or consequence is attached. This, it would seem, is a significant indication of a purpose that the penalty expressed in that particular kind of case should be exclusive."

Defendant in his reply to the petition for rehearing alleges that plaintiff had not argued the point prior to his petition for rehearing and therefore had waived it.

The statute was directly involved in the trial of the case and its availability as a defense is implicit in the decision of the trial court. The point being basic

to the determination of this case, we now must hold that noncompliance with the Assumed Business Name Act cannot deprive a plaintiff of the use of our courts to enforce his civil rights.

As this case must be tried on its merits we have refrained from discussing any of the facts out of which this note arose. Upon retrial, defendant is entitled to know the nature of the trust under which plaintiff sues and the facts concerning it.

For the reasons stated herein judgment of the Municipal Court of Chicago is reversed and said cause remanded.

Judgment reversed and cause remanded.

Friend and Scanlan, JJ., concur.

361

45212

S. VOGEL, as Trustee, doing business as RETAILER'S FINANCE CO., Appellant,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
MINNIE A. BRISTOL and the COSMOPOLITAN NATIONAL BANK OF CHICAGO, Appellees.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The only question in this case is whether an individual who is in fact a trustee doing business under an assumed name, may register that he as an individual is the owner and doing business under the assumed name. The trial court held he could not, and dismissed the suit.

The act provides that no person shall conduct or transact a business in this state under an assumed name, unless such person shall file in the office of the County Clerk a certificate setting forth the name under which the business is conducted and the true or real full names of the persons owning, conducting or transacting the same. The purpose of the act is obvious. It is to make a full disclosure to the public of the true ownership of the business conducted under the assumed name. The question is, therefore, whether S. Vogel, as trustee, is the same as S. Vogel, an individual. This is too clear for discussion. A man acting in the capacity of trustee is not the same as

a man acting in his individual capacity. Indeed, there are individuals acting in trust capacities, let us say as trustees of business trusts, who may conduct great enterprises, while in their individual capacities, they may be of relatively minor consequence. Trusts in modern times have been so organized as to correspond in many respects to the corporate form. We might as well say that a corporation operating under an assumed name would be entitled to register under this act. We are of the opinion that it would not. We doubt, indeed, that S. Vogel, as Trustee, can register under an assumed name. He should reveal to the public that he is a trustee and what sort of trustee he is, so that people who deal with him will be put on notice. There seem to be no precedents. Hence, the forum of common sense, to which the late eminent Justice John M. O'Connor of this court was wont to resort, is left in unbefogged authority.

Judgment affirmed.

Friend and Scanlan, JJ., concur.

45212

S. VOGEL, as Trustee, d.b.a. RETAILER'S FINANCE CO., Appellant,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
MINNIE A. BRISTOL and the COSMOPOLITAN NATIONAL BANK OF CHICAGO, Appellee.	)	OF CHICAGO.

OPINION ON PETITION FOR REHEARING.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The petition for rehearing in this cause brings to our attention the case of Grody, d.b.a. Modern Furnace Co. v. Mary Scalone, Docket 31631, Illinois Supreme court, holding that a failure to register pursuant to the Assumed Name Act cannot be availed of as a defense to a civil action. Petition for rehearing will be allowed, and on the reargument of the case we desire the parties to consider, in addition to any other pertinent matters, whether the fact that the point was not made in the trial court nor in this court until the filing of the petition for rehearing precludes appellant from now raising it.

The amount involved being small, defendants are granted leave to file a typewritten answer.

Petition for rehearing allowed.

Friend and Scanlan, JJ., concur.

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

~~OCTOBER~~ February TERM, A.D.1950

343 I.A. 146

General No. 9721 Agenda No. 5

James Brandt, Plaintiff-Appellee, vs. The Pennsylvania Railroad Company, a corporation, Defendant-Appellant.	Appeal from Circuit Court of Logan County

Wheat, J.

The plaintiff-appellee, James Brandt, obtained a judgment against defendant-appellant The Pennsylvania Railroad Company, in the sum of $4,583.00 upon verdict of a jury, in an action charging defendant with negligence. Motions for judgment notwithstanding the verdict and for new trial were denied and this appeal follows.

The action was brought under the provisions of Section 51, Title 45, of an Act of the United States, commonly known as The Federal Employers' Liability Act with reference to railroads, which provides that an employer railroad shall be liable in damages to an employee, for injury due to the negligence of the employer, or by reason of any defects or insufficiency in its equipment causing the injury. The complaint charged that plaintiff was an employee of defendant railroad; that on February 3, 1947, while engaged as a laborer or section hand, he was in the

Abstract

STATE OF ILLINOIS

APPELLATE COURT | FIRST DISTRICT

Term, 1948, A.D.

General No. 9721 | Agenda No. 5

James Brandt,
Plaintiff-Appellee,

vs.

The Pennsylvania Railroad Company, a corporation,
Defendant-Appellant.

Appeal from Circuit Court of Cook County

Wheat, J.

The plaintiff-appellee, James Brandt, obtained a judgment against defendant-appellant The Pennsylvania Railroad Company, in the sum of $[illegible],00 upon verdict of a jury, in an action charging defendant with negligence. Motions for judgment notwithstanding the verdict and for new trial were denied and this appeal follows.

The action was brought under the provisions of Section 51, Title 45, of an Act of the United States, commonly known as The Federal Employers' Liability Act with reference to railroads, which provides that an employer railroad shall be liable in damages to an employee, for injury due to the negligence of the employer, or by reason of any defects or insufficiency in its equipment causing the injury. The complaint charged that plaintiff was an employee of defendant railroad; that on February 3, 1947, while engaged as a laborer or section hand, he was in the

performance of his duties cutting and removing certain brush and briars along the railroad right of way; that in particular he was required to remove a certain blackberry bush and briar; that while doing so the briar penetrated his left ear, causing a complete and permanent loss of hearing in such ear. It is charged that defendant was negligent for two reasons: (1) That it instructed plaintiff to use a certain tool known as a brush hook which was unfit, improper, and dangerous for such work and was likely to cause injury to the plaintiff; and (2) That defendant failed to provide plaintiff with necessary and proper tools for the type of work in which he was engaged. The answer denied the charges of negligence.

The evidence indicates that plaintiff was one of a group of section men engaged in cutting brush and undergrowth along defendant's right of way; that plaintiff was using an implement designated as a brush hook which by his description consisted of a ~~cruved~~ curved metal blade about ten inches long attached to a wooden handle similar to an ax handle; that while so working a blackberry briar penetrated his left ear resulting in a substantial or complete loss of hearing in such ear.

As to the charge that plaintiff was instructed and directed to use the brush hook, his testimony disposes of the matter, as he stated that both axes and brush hooks were available for use of the group; that he could have used either as no one told him which to use, but that he selected the brush hook. As to the charge that defendant failed to furnish plaintiff with the necessary and proper tools for the work he was to do, it does not appear from the evidence that there was any particular defect in the particular implement which would render it unfit, dangerous, or likely to cause

performance of his duties cutting and removing certain brush and briars along the railroad right of way; that in particular he was required to remove a certain blackberry bush and briar; that while doing so the briar penetrated his left ear, causing a complete and permanent loss of hearing in such ear. It is charged that defendant was negligent for two reasons: (1) that it furnished plaintiff to use a certain tool known as a brush hook which was unfit, improper, and dangerous for such work and was likely to cause injury to the plaintiff; and (2) that defendant failed to provide plaintiff with necessary and proper tools for the type of work in which he was engaged. The answer denied the charges of negligence.

The evidence indicates that plaintiff was one of a group of section men engaged in cutting brush and undergrowth along defendant's right of way; that plaintiff was using an implement designated as a brush hook which by his description consisted of a curved metal blade about ten inches long attached to a wooden handle similar to an ax handle; that while so working a blackberry briar penetrated his left ear resulting in a substantial or complete loss of hearing in such ear.

As to the charge that plaintiff was instructed and directed to use the brush hook, his testimony disclosed of the direct, as he stated that both axes and brush hooks were available for use of the group; that he could have used either as no one told him which to use, but that he selected the brush hook. As to the charge that defendant failed to furnish plaintiff with the necessary and proper tools for the work he was to do, it does not appear from the evidence that there was any particular defect in the particular implement which would render it unfit, dangerous, or likely to cause

injury. Plaintiff testified that it was in good condition. The primary question seems to be whether or not any brush hook is within itself so inherently dangerous as to make it unfit for the work it was designed to do. Plaintiff preferred it to an ax and had been using one since his employment in April, 1944. Plaintiff's witness, Wesley Graham, who had worked as a section hand for years, selected a brush hook and said he preferred it to an ax and had been using one during such six year period. Plaintiff's witness, Perry French, testified that he had worked for the railroad eleven years and had used brush hooks during that period of time; that on the day in question he was using a brush hook because he liked it better than an ax; that no one told the men what implement to use. From the evidence it does not appear that there is anything inherently dangerous in the use of a brush hook, at least no more so than in the use of an ax, scythe, corn knife, or any similar implement used for cutting. This must be considered as specially demonstrated by plaintiff's testimony that he didn't know what caused the briar to penetrate his ear. He believed he struck at a small sapling and that a nearby blackberry bush vibrated resulting in the injury; that the bush was still standing after the injury. The proximate cause of the injury surely was not because the brush hook was defective, or that it was unsuited for brush removal, or that it was inherently dangerous.

In the case of Carrell v. N.Y.C.R.R.Co., 384 Ill. 599, appears a statement of the well recognized rule that a motion to direct a verdict should be allowed if, when all the evidence is considered, with all reasonable inferences to be drawn there-

injury. Plaintiff testified that it was in good condition. The primary question seems to be whether or not any brush hook is within itself so inherently dangerous as to make it unfit for the work it was designed to do. Plaintiff preferred to use an ax and had been using one since his employment in April, 1944. Plaintiff's witness, Harley Graham, who had worked as a section hand for years, selected a brush hook and said he preferred it to an ax and had been using one during such six year period. Plaintiff's witness, Perry Irene, testified that he had worked for the railroad eleven years and had used brush hooks during that period of time; that on the day in question he was using a brush hook because he liked it better than an ax; that no one told the men what implement to use. From the evidence it does not appear that there is anything inherently dangerous in the use of a brush hook, at least no more so than in the use of an ax, scythe, corn knife, or any similar implement used for cutting. This must be considered as specially demonstrated by plaintiff's testimony that he didn't know what caused the grip to penetrate his ear. He believed he struck at a small sapling and that a nearby blackberry bush vibrated resulting in the injury; that the bush was still standing after the injury. The proximate cause of the injury surely was not because the brush hook was defective, or that it was unsuited for brush removal, or that it was inherently dangerous.

In the case of Darrell v. [illegible] Co., 384 Ill. 579, appears statements of the well recognized rule that a motion to direct a verdict should be allowed if, when all the evidence is considered, with all reasonable inferences to be drawn therefrom

from in its aspect most favorable to the party against whom the motion is directed, there is a total failure to prove one or more necessary elements of the case, and that the same rule is applicable in passing upon a motion for judgment notwithstanding the verdict.

In the instant case there was a total failure to prove that plaintiff was instructed to use the implement in question or that the specific brush hook was defective, or that any brush hook generally was an improper or dangerous tool for the work it was designed to accomplish. There was also a total failure to show that the proximate cause of the injury had any relationship with the use of the brush hook in question. For these reasons the trial court erred in not allowing the motion for directed verdict in favor of the defendant and in not allowing the motion for judgment notwithstanding the verdict.

The judgment of the Circuit Court is reversed with directions to allow the motion for judgment notwithstanding the verdict and to enter a judgment in favor of defendant for costs.

Reversed.

45260

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

PASQUALE ESPOSITO, (Impleaded),
Plaintiff in Error.

ERROR TO CRIMINAL COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant sues out this writ of error to review the order of the Criminal court of Cook county revoking his probation granted July 20, 1949, after his being found guilty of burglary.

On March 29, 1950, the Chief Probation Officer made application to the court for a warrant for violation of probation and on that date the warrant issued. The basis for such application was that on March 23, 1950 defendant was charged by the Police of Bellwood, Illinois, with contributing to the delinquency of a minor and attempted rape and that said defendant "will appear in the Police Magistrate Court in Bellwood, Illinois, on March 30, 1950."

Defendant was brought before the court on the violation of probation hearing on April 14, 1950. Hearings were conducted on that date and on April 17 and 18, 1950. Defendant was found guilty of violating his probation and sentenced on the burglary charge to the penitentiary for a term of not less than two years nor more than ten years. At all these hearings defendant was

present in court and represented by counsel and testimony was introduced by the State and on defendant's behalf.

Defendant contends that the court erred in revoking the order of probation because there was no proof that the conditions of probation were violated; that there was no hearing; that he was not informed of the facts of the alleged violation by petition or pleading; that the proceedings were not under oath; that the proceedings were null and void and that the revocation order was based on the arbitrary and prejudicial action of the judge.

Section 789 of the Criminal Code (Ill. Rev. Stat. 1945, ch. 38) contains the following applicable provisions: "At any time during the period of probation, the court may, upon report by a probation officer or other satisfactory proof of the violation by the probationer of any of the conditions of his probation, revoke and terminate the same and issue a warrant for the arrest of the probationer, which * * * may be served by any probation officer in the state or by any officer authorized to serve criminal process in any city or county in the state. Upon the probationer being brought before the court for violation of his probation, the court may enter a rule upon the probationer to show cause why his probation should not be terminated and judgment entered, and sentence imposed upon the original conviction and release upon bail shall be allowed as in other cases."

There can be no question but that Sec. 789 contemplates that before defendant's probation can be revoked, defendant is entitled to know the violation he is charged with and to have a hearing on said violation.

On April 14, 1950 a hearing was had on the probation officer's application for termination of defendant's probation. Defendant and his counsel were present and his sister Mrs. Pellegrino offered testimony on defendant's behalf. The hearing was then continued to April 17, 1950 at which time additional evidence was heard and Mr. Pellegrino, defendant's brother-in-law, testified in defendant's behalf. Defendant was then found guilty of violation of his probation and was sentenced to the penitentiary on his original conviction.

A certified transcript of the Police Magistrate of the Village of Bellwood was filed and made a part of the record. It appears from said transcript that defendant pleaded guilty to the charge of contributing to the delinquency of a minor and the magistrate found him guilty and placed him under supervision of the court in Bellwood for six months. Although defendant contends that he was found not guilty, the transcript speaks for itself on this question.

The report of the probation officer shows that defendant and four others took a young girl sixteen years of age riding in a car. One of the defendants made indecent advances to the girl and after she submitted to

indecent liberties called the other defendants, who took the same liberties. The girl was taken home about 3:00 A.M. and after questioning her, her parents made complaint to the police.

At no time during the hearings did defendant complain that he was not aware of the charges made against him. At no time did he offer any evidence in explanation of his conduct and although the procedure followed was rather informal, it cannot be denied that defendant was given the fullest opportunity to explain his conduct.

In People v. Cahill, 300 Ill. 279, it was stated: "The record does show that there was no formal entry of a rule on defendant, as required by the act, to show cause why his probation should not be terminated and judgment entered, but it does sufficiently appear that there was a hearing before the court upon that very question, and that the defendant undertook to show cause why he should not be sentenced. * * * there is no substantial showing that the defendant was prejudiced by any of the proceedings complained of, or that he lost any right by reason thereof." We believe this case is squarely applicable to the instant case.

Defendant cites People v. Enright, 332 Ill. App. 655, for reversal. It appears that Enright's probation was revoked without any hearing whatsoever. The court observed in its opinion that the probation officer who brought defendant into court filed no report and sub-

mitted no "satisfactory proof" of violation by the probationer of any of the conditions of his probation. The court stated: "It would be a simple act for the probation officer to file a petition or other written pleading setting forth the facts relied upon for the suspension of sentence, and the defendant should then be given an opportunity to answer or plead to the charge made, and a hearing, even though informal * * * should be had, from which it could at least be fairly determined whether the defendant had violated the conditions of his probation." The procedure outlined in the Enright case was followed in this case.

In People v. Warren, 314 Ill. App. 198, the state failed to obtain an indictment against Mrs. Warren while she was on probation, which is quite different from this case wherein the record shows that defendant pleaded guilty to a charge of contributing to the delinquency of a minor.

Defendant argues that "a police magistrate has no jurisdiction to try a charge of contributing to the delinquency of a minor, since the law limits his authority to cases where the penalty is by fine only." Whether or not the police magistrate had jurisdiction is immaterial on this hearing. Defendant was charged with contributing to the delinquency of a minor in violation of "chap. 38 104-2, 1949 Illinois Revised Statutes," and to this charge the record shows that he pleaded guilty. The condition

of his probation was that "defendant shall not, during the term of said probation, violate any criminal law of the State of Illinois, or any ordinance of any municipality of said State." We believe the certified copy of the transcript of proceedings before the Police Magistrate showing a plea of guilty to a criminal act was sufficient satisfactory proof to corroborate the charges made against defendant by the probation officer.

An application for violation of probation was filed,charging in particular defendant's violation; at least two hearings were had by the court at which defendant was represented by counsel and knew at all times the charge made against him and was given an opportunity to offer evidence in his behalf; the state showed by satisfactory proof defendant's violation; defendant offered no evidence to explain or in mitigation of his offense. From this record, it appears that the trial judge did not abuse his discretion or act arbitrarily in revoking defendant's probation.

The order and judgment of the Criminal Court of Cook County is affirmed.

Order and judgment affirmed.

Friend and Scanlan, JJ., concur.

418

A

45050

343 I.A. 147

HOGAN & FARWELL, INC., a corporation, Appellee,	)	APPEAL FROM CIRCUIT
v.	)	COURT, COOK COUNTY.
450 EAST OHIO STREET CORPORATION, a corporation, Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff corporation, a duly licensed real estate broker, sued at law to recover $11,750, being balance alleged to be due it as third-party beneficiary under a written contract entered into between defendant as seller and Northwestern University as purchaser of property located at 450 East Ohio street in Chicago. Summary judgment was rendered for $7750 in favor of plaintiff. Defendant's motion for summary judgment in its favor for all of plaintiff's claim in excess of $4050, was denied. Defendant appeals from both judgment orders.

It appears from the pleadings, exhibits and affidavits filed in support of the motions for summary judgment, that in June 1946 defendant gave plaintiff an exclusive listing on the property, reserving to itself only Northwestern University and an Indiana corporation, two prospects which defendant retained for the purpose of undertaking the sale. H. S. Marshall, president of the defendant corporation and an attorney at law well versed in problems of real estate management and valuation, made efforts to sell the property to Northwestern University, but without success. In the fall of 1947 he decided it was a propitious

time to sell the building, and during a conference with C. K. Hunter, who was associated with the plaintiff corporation, Marshall told Hunter that he "had had no luck either with Northwestern University or the Indiana corporation." Hunter asked whether he could try Northwestern University, and "Marshall said it was okay." Hunter thereupon negotiated with Northwestern through Mr. Wells, its business manager, holding numerous conferences with him and other representatives of the university. Following these conferences Wells told Hunter that Northwestern was not interested in the property because the then asking price of $475,000 was too high; Wells thought the building was not worth more than $400,000 at most. Hunter reported this conversation to Marshall, and told him that in his opinion the top price that could be realized from a sale of the property would be $400,000. His opinion was based in part on recent sale prices for similar property. About January 10, 1948, after making various unsuccessful attempts to sell the property to other individuals and corporations, Hunter again called Wells in another effort to persuade Northwestern University to purchase the building, urging that it was suited to specific projects contemplated by the university. At Hunter's request Wells sent university representatives to meet with Hunter on the premises, where Hunter pointed out that the physical arrangement of the building was peculiarly appropriate to Northwestern's projected needs. After several conferences with his associates Wells again asked Hunter the minimum price for the building, and Hunter gave him the figure of

$435,000. After further discussion Wells finally agreed to that price on behalf of the university, and Hunter in turn advised Marshall that Northwestern was willing to pay $435,000 for the building. Marshall agreed to that figure as satisfactory, and told Hunter that since he controlled the board of directors of the defendant corporation, its approval of the sale was a certainty. Thereupon Hunter caused to be prepared a form of contract of sale of the building which was submitted to Mr. Lewis C. Murtaugh, an attorney at law and a partner of Marshall, in accordance with Marshall's instructions. Murtaugh approved the contract after some revision. Between January 26-28, 1948 both Northwestern and defendant corporation executed the contract for sale of the building. By March 22, 1948 Northwestern University had performed all its obligations under the contract, including payment of the entire balance of the purchase price direct to defendant corporation, which conveyed the property to Northwestern, thus completing performance of the agreement by both parties.

The printed provision in the contract which is the basis of plaintiff's claim for commission is as follows: "The seller agrees to pay a broker's commission to Hogan and Farwell, Inc. in the amount fixed in the present schedule of commissions of the Chicago Real Estate Board applicable to this sale." About March 15, 1948 Hunter instructed a Mrs. Randall, an employee of plaintiff corporation whose duties consisted in part of computing real-estate commissions, to prepare a computation of the commission due plaintiff from

defendant. Mrs. Randall furnished Hunter with a statement of the amount of commission believed to be due. On the basis of that statement Hunter wrote a letter to Marshall under date of March 16, 1948 in which he stated that the total commission due plaintiff on the sale was $17,750. However, this amount was the result of a clerical error in the computation, and subsequently on March 31, 1948 plaintiff prepared and sent to defendant an invoice billing defendant on the basis of $18,050 and crediting defendant with the prior payment of $10,000 which had been deposited with plaintiff when the contract was made, it having been the intention of both parties to the contract that the $10,000 earnest money be retained by plaintiff as partial payment on the commission due and that plaintiff was to bill defendant for the balance. Defendant refused to pay plaintiff either the sum of $7750, the incorrectly computed balance, or the sum of $8050, claiming that plaintiff was entitled only to an additional $4050; and it sent plaintiff a check in that amount. Plaintiff refused to accept the $4050 check and returned it to defendant corporation with the request for a check in the amount of $8050. At the conclusion of the hearing the trial judge indicated that he had first concluded to enter judgment for $8050, but upon reconsideration had decided to reduce it to $7750, which was the amount shown by plaintiff's first statement when the deal was consummated. Plaintiff is willing to accept that amount, but defendant takes the position that it should not be required to pay more than $4050.

The controversy between the parties centers around

the printed provision for commission hereinbefore set forth. What was the rate fixed "in the * * * schedule of commissions of the Chicago Real Estate Board applicable to this sale"? Plaintiff claims that when the sales contract was executed on January 26-28, there was in effect a schedule of commissions of the Chicago Real Estate Board, applicable to that sale, of five per cent, whereas defendant contends that a staggered rate was in effect which would have entitled plaintiff to a balance of only $4050. The determination of the controversy requires an examination of the minutes and resolutions of the committees and board of directors of the Chicago Real Estate Board, submitted with the motions for summary judgment. It appears that early in January, 1948, Warner G. Baird, president, had advised the board of directors of the Chicago Real Estate Board that the appraisers division, board of governors, was concurrently studying the recommendation that the board schedule of appraisers' fees should be increased. There followed a general discussion of the factors currently affecting the promulgation of the board's schedule of commission rates, and the board ultimately approved the changes in the commission's schedules as recommended by its board of governors. The new rate as approved by the board was a straight five per cent, and that schedule was in effect on the day the sale was consummated. On January 2, 1948, after the straight five per cent rate had been approved by the board, and after some discussion "it was regularly moved, seconded and voted to authorize the printing of 10,000 copies of the new schedule." The

minutes of the January 20, 1948 meeting of the standing committee show that: "Chairman Chinnock called the meeting to order at 1:05 P.M. and stated that the following two changes in the existing Schedule on Commission Rates had already been approved by the Committee: 1) that the Schedule on Commission Rates to be approved by the Commitee would be published as a 'recommended' schedule of rates [and] 2) Adoption of a recommendation of the Board of Governors of the Brokers Division that the commission on the sales of improved business and residential properties be a straight 5 per cent * * *."

Defendant argues that in order to establish a schedule the rates had to be published. The by-law providing for the standing committee on commission rates contains the following provision: "The purpose of the Committee on Commission Rates shall be to prepare and publish no less than once each calendar year a schedule of commission rates which shall be deemed to represent fair and just compensation for services rendered by real estate brokers and managers and which shall be recommended for use by all members of The Chicago Real Estate Board." The schedule itself was to be prepared before it could be published; and although publication was specifically contemplated it was not a prerequisite to the existence of a "schedule." This conclusion is substantiated by the minutes of the Real Estate Board committee meetings. The following excerpt from the January 2, 1948 meeting of the standing committee, immediately following reference to the straight five-per-cent rate recommendation

by the brokers division, board of governors, is significant: "The Chairman advised that the Board had received several printing estimates and that the Argyle Press had estimated a cost of $450 for 5,000 copies and $675 for 10,000 copies. After some discussion it was regularly moved, seconded and voted to authorize the printing of 10,000 copies of the new schedule. It was the consensus of the committee that distribution of the new schedule be set up on the following basis: 1) Free copy to all members of the Board; 2) Additional single copies--25¢ each; 3) $2.00 per dozen; and 4) $15.00 per hundred." (Italics ours.) This indicates that although printing and distribution of the new schedule was planned there was a schedule in effect before the publication--and that schedule called for a straight five per cent commission which was "the present schedule of commissions of the Chicago Real Estate Board appplicable to this sale," as provided in the sales agreement.

As an additional defense interposed affirmatively in its second amended answer defendant takes the position that there was a fiduciary relationship between plaintiff and defendant which required Hunter to inform Marshall of the change in commission rates by the Chicago Real Estate Board, and that his failure so to do amounted to such breach as to defeat a claim for commission in its entirety. Defendant says that because of Hunter's membership on the standing committee on commission rates, he knew of the change in rates but withheld the information from Marshall. In his affidavit Marshall alleged that after Northwestern

University had agreed to pay $435,000 for the property, he and Hunter discussed commissions; that after making a calculation Marshall told Hunter that the deposit of $10,000 was so small that it would not even pay the broker's commission in full, but that Hunter said nothing about a change in rates. Hunter in his affidavit stated that he did not know all the details of the conduct of various bodies with reference to a contemplated change in rates, and denied that any representative of defendant had asked him for information as to the existing rates at that time. The minutes of the Real Estate Board show that Hunter was present only at the meeting of the committee on January 2, 1948, and not at the meeting on January 5, 1948 at which the board approved the five per cent commission. Neither was Hunter present at the January 20 meeting of the standing committee at which the announcement was made that the committee had approved of the flat five per cent rate. His affidavit states that he had seen some of the documents reflecting the action of the Real Estate Board in adopting new recommended rates for commission increases as taken by various committees and the board of governors, but that he did not know all the details of the conduct of the various committees at that time. It therefore became important, on motion for summary judgment, to determine whether Hunter knew the facts as to the change in rates and whether, even had he known the facts, he would have owed the affirmative duty to disclose them. Obviously he and Marshall had a different understanding of their conversation relating to commissions before the sale was made; Hunter be-

lieved the oral and written agreement as to commissions to amount to the same thing. We think the conclusion of the trial court that defendant by its affidavit failed to show that Hunter knew of the flat five per cent rate when the contract was signed on January 26 is borne out by the record, and under the circumstances the court would not have been justified in finding, on motion for summary judgment, that Hunter either knew of the change in rates or withheld information pertaining thereto. The affidavits filed by defendant do not show a breach of faith or fiduciary duty on the part of Hunter.

Defendant was evidently anxious to sell its building, and after having failed to obtain a purchaser, plaintiff undertook to do so for it, and in fact procured such a purchaser--Northwestern University--at the satisfactory price of $435,000. We find no convincing reason why defendant should not pay the commission provided for in the agreement between seller and purchaser--which according to schedules theretofore adopted by the Chicago Real Estate Board amounted to five per cent of the purchase price; and since plaintiff is willing to accept the incorrectly computed balance of $7750 for which judgment was entered, the summary judgment of the Circuit Court in that amount is affirmed, as is the judgment order denying defendant's motion for summary judgment.

Judgment affirmed in toto.

Schwartz, P. J., and Scanlan, J., concur.

419

Consol. 45289
45253

FRED W. HARTMAN et al., Appellees,	)	APPEAL FROM SUPERIOR
v.	)	COURT OF COOK COUNTY.
CITY OF CHICAGO, a Municipal Corporation, Appellant.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing in this court with the appeal in Fred W. Hartman et al., Appellees, v. City of Chicago, a Municipal Corporation, Appellant, Gen. No. 45289. Later these two cases were set down for hearing upon the oral argument call with the case of Fred W. Hartman et al., Appellees, v. City of Chicago, a Municipal Corporation, Appellant, Gen. No. 44985. Attorney Michael F. Ryan represented the appellees in the three cases in their briefs and upon the oral argument. Mr. Ryan contended that the three cases involved the same legal points and presented questions of law only. We agree with that contention.

We have this date filed an opinion in the case of Fred W. Hartman et al., Appellees, v. City of Chicago, a Municipal Corporation, Appellant, Gen. No. 44985. Our decision in that case is controlling as to the questions presented in the instant case, and for the reasons stated in our opinion the judgment order of the Superior court of Cook county, entered on April 18, 1950, in the instant case, is reversed in toto.

JUDGMENT ORDER REVERSED.

Schwartz, P. J., and Friend, J., concur.

Consolidated with 45253. ~~420~~

45289

FRED W. HARTMAN et al., Appellees,	)	
v.	)	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
CITY OF CHICAGO, a Municipal Corporation, Appellant.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing in this court with the appeal in Fred W. Hartman et al., Appellees, v. City of Chicago, a Municipal Corporation, Appellant, Gen. No. 45253. Later these two cases were set down for hearing upon the oral argument call with the case of Fred W. Hartman et al., Appellees, v. City of Chicago, a Municipal Corporation, Appellant, Gen. No. 44985. Attorney Michael F. Ryan represented the appellees in the three cases in their briefs and upon the oral argument. Mr. Ryan contended that the three cases involved the same legal points and presented questions of law only. We agree with that contention.

We have this date filed an opinion in the case of Fred W. Hartman et al., Appellees, v. City of Chicago, a Municipal Corporation, Appellant, Gen. No. 44985. Our decision in that case is controlling as to the questions presented in the instant case, and for the reasons stated in our opinion the judgment order of the Superior court of Cook county, entered on June 29, 1950, in the instant case, is reversed in toto.

JUDGMENT ORDER REVERSED.

Schwartz, P. J., and Friend, J., concur.

approved

Abstract

Gen. No. 10433. Agenda No. 2.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

OCTOBER TERM, A. D. 1950.

PETER SCHMITT, Plaintiff, Appellee, vs. A. M. FRIEDERICH, Defendant, Appellant.	Appeal from the Circuit Court of LaSalle County.

WOLFE,-- P. J.

On December 3, 1946, the plaintiff, Peter Schmitt, filed his complaint in the Circuit Court of LaSalle County, alleging that on the 5th day of December 1944, the defendant, A. M. Friederich, was the owner and operating an automobile at a point about twelve miles east of the city of Plainfield in Will County, Illinois; that the plaintiff was riding as a passenger for hire in said automobile and was being transported from Chicago to his home in LaSalle; that said automobile was being driven on U. S. Route No. 66, which is a much travelled and hard-surfaced highway; that it was cold and dark and had been snowing and raining and that the rain froze on the surface of the highway, causing the road to become icy and slippery; that the plaintiff was in the exercise of due care and caution

Gen. No. 10433. Agenda No. 2.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

OCTOBER TERM, A. D. 1950.

PETER SCHMITT, Plaintiff, Appellee,	Appeal from the Circuit Court of LaSalle County.
vs.	
A. M. FRIEDERICH, Defendant, Appellant.	

WOLFE,--- P. J.

On December 3, 1945, the plaintiff, Peter Schmitt, filed his complaint in the Circuit Court of LaSalle County, alleging that on the 5th day of December 1944, the defendant, A. M. Friederich, was the owner and operating an automobile at a point about twelve miles east of the city of Plainfield in Will County, Illinois; that the plaintiff was riding as a passenger for hire in said automobile and was being transported from Chicago to his home in LaSalle; that said automobile was being driven on U. S. Route No. 66, which is a much travelled and hard-surfaced highway; that it was cold and dark and had been snowing and raining and that the rain froze on the surface of the highway, causing the road to become icy and slippery; that the plaintiff was in the exercise of due care and caution

for his own safety; that the defendant carelessly and negligently operated his automobile at a high and dangerous rate of speed in violation of the Illinois Statute; that he negligently drove said automobile without maintaining a proper control thereof; that he negligently applied the brakes, causing said automobile to skid, whereby the defendant lost control of said automobile and the same left the road and upset; that the defendant with full knowledge of the icy and slippery condition of the road, negligently operated his automobile in such a manner that the same left the road and upset; that as a direct and proximate result of the carelessness and negligence of the defendant, the plaintiff sustained serious and permanent injuries.

The defendant filed his answer and denied all acts of negligence on his part and denied that he was guilty of any negligence that caused any injury to the plaintiff.

The case was submitted to a jury for their consideration and they found the issues in favor of the plaintiff and assessed his damages at $10,000.00. The defendant filed a motion for a new trial, which the Court overruled, and then entered judgment on the verdict in favor of the plaintiff and against the defendant for $10,000.00. It is from this judgment that the defendant has perfected an appeal to this Court.

The evidence shows that in 1941, the plaintiff, Peter Schmitt, had been employed by a baking company, and during the course of his employment there he had sustained an accidental injury to his right leg and a fractured hip. He was in the hospital for several months, where different operations had been performed on his hip without success. He was unable to work, but got around on two crutches and sometimes in a wheel chair.

for his own safety; that the defendant carelessly and negligently operated his automobile at a high and dangerous rate of speed in violation of the Illinois Statute; that he negligently drove said automobile without maintaining a proper control thereof; that he negligently applied the brakes, causing said automobile to skid, whereby the defendant lost control of said automobile and the same left the road and upset; that the defendant with full knowledge of the icy and slippery condition of the road, negligently operated his automobile in such a manner that the same left the road and upset; that as a direct and proximate result of the carelessness and negligence of the defendant, the plaintiff sustained serious and permanent injuries.

The defendant filed his answer and denied all acts of negligence on his part and denied that he was guilty of any negligence that caused any injury to the plaintiff.

The case was submitted to a jury for their consideration and they found the issues in favor of the plaintiff and assessed his damages at $10,000.00. The defendant filed a motion for a new trial, which the Court overruled, and then entered judgment on the verdict in favor of the plaintiff and against the defendant for $10,000.00. It is from this judgment that the defendant has perfected an appeal to this Court.

The evidence shows that in 1941, the plaintiff, Peter Schmitt, had been employed by a baking company, and during the course of his employment there he had sustained an accidental injury to his right leg and a fractured hip. He was in the hospital for several months, where different operations had been performed on his hip without success. He was unable to work, but got around on two crutches and sometimes in a wheel chair.

This condition existed until the month of May 1944. He was taken to Chicago where a Doctor Berkheiser examined him and made X-rays of his right hip. Later, the doctor operated on the hip and had reasonably good success so that the plaintiff could walk with the aid of one crutch and a cane. On December 5, 1944, the plaintiff employed the defendant to take him to the Presbyterian Hospital in Chicago for the purpose of having Doctor Berkheiser again examine him. The trip to Chicago was made and on the return from the hospital to his home in LaSalle, Illinois is when the accident occurred.

The plaintiff testified on his own behalf that just as they were leaving the hospital in Chicago it was snowing and raining and the roads were slippery and icy; that he told the defendant, Friederich, that they were in no hurry to get home and to take their time; that everything went along all right until they were within a few miles of Plainfield, Illinois, when the car suddenly skidded and left the road and overturned and that his leg was injured; that he was taken home and he had severe pain just above his knee in his right leg; that he called a doctor who told him to put hot applications on it and he thought it would get along all right. This, he said he did, but got no relief from it and suffered very severe pain; that he was in pain most of the time from December 5, 1944, until March 30, 1945; that on that date he was again taken to Doctor Berkheiser in Chicago, and the doctor examined and made X-rays of his right leg; that since said accident on December 5, 1944, he has had no other accident or injury to his leg and now has scarcely any use of the same, but still suffers pain from his injuries.

This condition existed until the month of May 1944. He was taken to Chicago where a Doctor Berkheiser examined him and made X-rays of his right hip. Later, the doctor operated on the hip and had reasonably good success so that the plaintiff could walk with the aid of one crutch and a cane. On December 5, 1944, the plaintiff employed the defendant to take him to the Presbyterian Hospital in Chicago for the purpose of having Doctor Berkheiser again examine him. The trip to Chicago was made and on the return from the hospital to his home in Lasalle, Illinois is when the accident occurred.

The plaintiff testified on his own behalf that just as they were leaving the hospital in Chicago it was snowing and raining and the roads were slippery and icy; that he told the defendant, Friedrich, that they were in no hurry to get home and to take their time; that everything went along all right until they were within a few miles of Plainfield, Illinois, when the car suddenly skidded and left the road and overturned and that his leg was injured; that he was taken home and he had severe pain just above his knee in his right leg; that he called a doctor who told him to put hot applications on it and he thought it would get along all right. This, he said he did, but got no relief from it and suffered very severe pain; that he was in pain most of the time from December 5, 1944, until March 30, 1945; that on that date he was again taken to Doctor Berkheiser in Chicago, and the doctor examined and made X-rays of his right leg; that since said accident on December 5, 1944, he has had no other accident or injury to his leg and now has scarcely any use of the same, but still suffers pain from his injuries.

Rose Trestrail testified that the plaintiff, Peter Schmitt, had boarded and roomed at her home in LaSalle for quite a number of years; that she accompanied him on his trip to Chicago on December 5, 1944; that on the return trip, just before they were leaving the hospital, she told the defendant, Friederich, not to be in any hurry in going home, as she didn't care particularly if they were an hour late; that it was snowing and raining when they left Chicago, and the highways were slippery and icy.

Doctor Berkheiser was called as a witness by the plaintiff and testified that he had many years' experience in taking X-ray pictures and reading the same; that he took an X-ray picture of the plaintiff, Peter Schmitt's right leg at the knee joint and also measured the plaintiff's legs and found that the right leg was approximately two and three-fourths inches shorter than the left leg; that prior to December 5, 1944, he had measured the plaintiff's legs, and at that time the right leg was one and one-fourth inches shorter than the left. He said the X-rays clearly show that there is a fracture of the right femur above the knee joint resulting in an overriding of the fragments of approximately one and one-fourth inches. At the time the doctor was testifying, the defendant strenuously objected to practically every question that was asked the doctor, on the ground that there had not been sufficient foundation laid for the doctor to testify, but we find no error in admitting the doctor's evidence.

On the trip to and from Chicago there was a man by the name of Curtin riding with them. He was called as a witness by the defendant and was asked if he had heard either the plaintiff or Mrs. Trestrail state anything to Mr. Friederich about not driving fast on the road home. He said that he did not hear any

Noel Trestrail testified that the plaintiff, Peter Sommitt, had boarded and roomed at her home in Dekalb for quite a number of years; that she accompanied him on his trip to Chicago on December 5, 1944; that on the return trip, just before they were leaving the hospital, she told the defendant, Friedrich, not to be in any hurry in going home, as she didn't care particularly if they were an hour late; that it was snowing and raining when they left Chicago, and the highways were slippery and icy.

Doctor Berthelsen was called as a witness by the plaintiff and testified that he had many years' experience in taking X-ray pictures and reading the same; that he took an X-ray picture of the plaintiff, Peter Sommitt's right leg at the hospital and also measured the plaintiff's legs and found that the right leg was approximately two and three-fourths inches shorter than the left leg; that prior to December 5, 1944, he had measured the plaintiff's legs, and at that time the right leg was one and one-fourth inches shorter than the left. He said the X-rays clearly show that there is a fracture of the right femur above the knee joint resulting in an overriding of the fragments of approximately one and one-fourth inches. At the time the doctor was testifying, the defendant strenuously objected to practically every question that was asked the doctor, on the ground that there had not been sufficient foundation laid for the doctor to testify, but we find no error in admitting the doctor's evidence.

On the trip to and from Chicago there was a man by the name of Curtis riding with them. He was called as a witness by the defendant and was asked if he had heard either the plaintiff or Mrs. Trestrail state anything to Mr. Friedrich about not driving fast on the road home. He said that he did not hear any

such conversation, but he did say in answer to the question, "What was the condition of the weather, as you left Chicago?" Answer, "It was all right until we got out and it started snowing big flakes; it turned into rain until it started sleeting. The first thing we knew it froze."

In the defendant's testimony he denied that he had had any conversation with either the plaintiff or Mrs. Trestrail at, or near the hospital in Chicago about his not driving fast on the way home. He also testified that at the time of the accident in question, he was driving forty to forty-five miles per hour. The plaintiff testified that in his opinion, that at the time of the accident the car was being driven at a rate of speed of approximately forty-five to fifty miles per hour.

The X-rays taken by Doctor Berkheiser are in the record and examination of them clearly discloses to even a layman, that there is a complete fracture of the bone above the knee, and that there is an overlapping to a considerable extent. There is not one bit of evidence to the contrary, but that the plaintiff was injured in this accident and seriously.

The defendant argues that there is no evidence to sustain the charge in the complaint that the car turned over. The record discloses that in answer to a question of what happened on the way home, the plaintiff testified, "We got in an accident on a slippery pavement, and the car rolled over," and again in answer to a question of, "What happened?" The answer was, "The car went off the road." The next question then, "What did it do?" "It turned over and rolled back on the

such conversation, but he did say in answer to the question, "What was the condition of the weather, as you left Chicago?" Answer, "It was all right until we got out and it started snowing big flakes; it turned into rain until it started sleeting. The first thing we knew it froze."

In the defendant's testimony he denied that he had had any conversation with either the plaintiff or Mrs. Treatwell at, or near the hospital in Chicago about his not driving fast on the way home. He also testified that at the time of the accident in question, he was driving forty to forty-five miles per hour. The plaintiff testified that in his opinion, that at the time of the accident the car was being driven at a rate of speed of approximately forty-five to fifty miles per hour.

The X-rays taken by Doctor Jerkheimer are in the record and examination of them clearly discloses to even a layman, that there is a complete fracture of the bone above the knee, and that there is an overlapping to a considerable extent. There is not one bit of evidence to the contrary, but that the plaintiff was injured in this accident and seriously.

The defendant argues that there is no evidence to sustain the charge in the complaint that the car turned over. The record discloses that in answer to a question of what happened on the way home, the plaintiff testified, "We got in an accident on a slippery pavement, and the car rolled over," and again in answer to a question of, "What happened?" The answer was, "The car went off the road." The next question then, "What did it do?" "It turned over and rolled back on the

wheels again." The evidence clearly shows that the plaintiff did testify that the car rolled over. It might be observed that neither the defendant nor his witness, Curtin, denied that the car turned over at the time of the accident, and the statement of the plaintiff that it did so, went to the jury unchallenged. Whether the plaintiff had proven his case was a question for the jury. We think that the evidence fully sustains their finding.

This case is peculiar in one respect, that the plaintiff was seriously injured prior to the accident in question; that he had claimed compensation from the company for which he was working for injuries to his hip. Before the final decision in that case, this accident occurred and this suit was started. The plaintiff is not trying to recover any damages for his injury to his hip, but simply the damage that was caused by the breaking of his leg just above the knee. The plaintiff was awarded several thousand dollars, and a pension for life as being totally disabled on account of his previous injuries, but the evidence shows that he was getting around on a crutch and cane and would walk a block or so from his home and visit with his neighbors and friends near his home; that after the injury to his knee he had been unable to do so, and the use of the right leg is noticeably limited to what it was before his second accident.

The appellant charges that the Court erred in refusing to give his instruction No. 1 and in giving the plaintiff's instructions Nos. 1, 2, 3, 10, 11, 12 and 13. The appellant has not pointed out in his argument wherein the Court erred in refusing

wheels again." The evidence clearly shows that the plaintiff did testify that the car rolled over. It might be observed that neither the defendant nor his witness, Curtin, denied that the car turned over at the time of the accident, and the statement of the plaintiff that it did so, went to the jury unchallenged. Whether the plaintiff had proven his case was a question for the jury. We think that the evidence fully sustains their finding.

This case is peculiar in one respect, that the plaintiff was seriously injured prior to the accident in question; that he had claimed compensation from the company for which he was working for injuries to his hip. Before the final decision in that case, this accident occurred and this suit was started. The plaintiff is not trying to recover any damages for his injury to his hip, but simply the damage that was caused by the breaking of his leg just above the knee. The plaintiff was awarded several thousand dollars, and a pension for life as being totally disabled on account of his previous injuries, but the evidence shows that he was getting around on a crutch and cane and would walk a block or so from his home and visit with his neighbors and friends near his home; that after the injury to his knee he had been unable to do so, and the use of the right leg is noticeably limited to what it was before his second accident.

The appellant charges that the Court erred in refusing to give his instruction No. 1 and in giving the plaintiff's instructions Nos. 1, 2, 3, 10, 11, 12 and 13. The appellant has not pointed out in his argument wherein the Court erred in refusing

to give his instruction No. 1. It is not claimed in any way, either in the pleadings or evidence that the defendant is asking for any damages whatsoever for the injuries that occurred to him in 1941. We find no error in the Court's refusal to give this instruction.

The defendant has not seen fit to argue wherein plaintiff's instruction No. 1 is erroneous, so it will be considered as waived. Plaintiff's given instruction No. 3 and 10 relate to the question of damages. No. 11 states the law relative to speed. No. 12 is general in its nature. These instructions are standard form and we see no merit in appellant's contention that they were not proper under the circumstances in the present case.

Plaintiff's given instruction No. 13 explains the issues in the case. While it is lengthy, the facts are not complicated. It fairly sets forth what the plaintiff charges in his complaint, and then states what part of the charges are denied. We think the instruction was proper.

Plaintiff's given instruction No. 2 states as follows: "The Court instructs the jury if you find from the evidence," etc. The words "preponderates or greater weight" are omitted from this instruction. It is conceded that this instruction is erroneous, but it is the appellee's position that it is not reversible error to give such an instruction, since there are other instructions that cover the point that the plaintiff must prove his case by a preponderance of the evidence. It is not every error in a case that is sufficient for a reversal of the judgment of the trial court. As before stated in this opinion,

to give his instruction No. 1. It is not claimed in any way, either in the pleadings or evidence that the defendant is asking for any damages whatsoever for the injuries that occurred to him in 1921. We find no error in the Court's refusal to give this instruction.

The defendant has not seen fit to argue wherein plaintiff's instruction No. 1 is erroneous, so it will be considered as waived. Plaintiff's given instruction No. 3 and 10 relate to the question of damages. No. 11 states the law relative to speed. No. 12 is general in its nature. These instructions are standard form and we see no merit in appellant's contention that they were not proper under the circumstances in the present case.

Plaintiff's given instruction No. 13 explains the issues in the case. While it is lengthy, the facts are not complicated. It fairly sets forth what the plaintiff charges in his complaint, and then states what part of the charges are denied. We think the instruction was proper.

Plaintiff's given instruction No. 2 states as follows: "The Court instructs the jury if you find from the evidence," etc. The words "preponderates or greater weight" are omitted from this instruction. It is conceded that this instruction is erroneous, but it is the appellee's position that it is not reversible error to give such an instruction, since there are other instructions that cover the point that the plaintiff must prove his case by a preponderance of the evidence. It is not every error in a case that is sufficient for a reversal of the judgment of the trial court. As before stated in this opinion,

there is no dispute in regard to the evidence except as to speed. The car was being driven at least forty miles per hour and perhaps fifty at the time of the accident, and this instruction only covers that part of the charge with reference to the speed of the defendant's car at the time of the accident in question. It is our conclusion that the jury could not be misled by omitting the words "preponderance or greater weight of the evidence."

From an examination of this record we are satisfied that the defendant had a fair and impartial trial, and the judgment of the trial court should be and is affirmed.

Judgment affirmed.

there is no dispute in regard to the evidence except as to speed. The car was being driven at least forty miles per hour and perhaps fifty at the time of the accident, and this instruction only covers that part of the charge with reference to the speed of the defendant's car at the time of the accident in question. It is our conclusion that the jury could not be misled by omitting the words "preponderance or greater weight of the evidence."

From an examination of this record we are satisfied that the defendant had a fair and impartial trial, and the judgment of the trial court should be and is affirmed.

Judgment affirmed.

436

45068

JOHN GRIB, Appellee,	)	
v.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
CHICAGO TRANSIT AUTHORITY, a municipal corporation, Appellant.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff was struck by a streetcar at or about the place where the Wabash avenue viaduct passes over Hubbard street in Chicago. He sustained severe injuries and brought this suit to recover damages. The jury returned a verdict for $25,000 and after the usual post trial motions the court entered judgment thereon. From this judgment defendant appealed. The two principal grounds relied upon for reversal are that plaintiff was guilty of contributory negligence as a matter of law and that the verdict is against the manifest weight of the evidence.

In considering the first question, as to whether plaintiff was guilty of contributory negligence as a matter of law, a definite and well-established rule must be applied. This requires the court to consider the evidence in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 Ill. 188; Roadruck v. Schultz, 333 Ill. App. 476; Blair v. Blair, 341 Ill. App. 93, and many other cases there cited. Examined in this light, the case presented by plaintiff is in substance as follows: Plaintiff was a brass polisher working in the

Wrigley Building. On the date of the accident, January 10, 1948, he quit work at 1:30 in the morning and started for home. He went up the steps on the east side of Wabash avenue leading to the viaduct, then north about 100 feet to a point opposite the post on the west side of the street where southbound streetcars stop to pick up and discharge passengers. It was his purpose to take a southbound streetcar going home. He looked north, saw a streetcar turn south on Wabash avenue from Grand avenue, about 600 feet north of the stopping point in question, concluded he had ample time to cross the street before the streetcar reached the stopping point, started across, and when he was in the middle of the street, raised his hand to the motorman of the streetcar to stop, feeling sure the motorman was on the lookout for passengers at the stopping point and would see him. The motorman did not stop or slow down, but kept going at 40 miles per hour and knocked plaintiff down on the west rail of the southbound car tracks, that is, as he was just about to clear the tracks. The place of impact was at the northwest corner of Wabash avenue viaduct and Hubbard street. Plaintiff heard no sound of a bell, gong or warning of any kind, the inference being that if the motorman had not intended to stop his car, he should have sounded a bell warning plaintiff. There was also testimony from which it may be inferred that the motorman did not see plaintiff and did not apply the brakes until after he hit him. The car went about a length and a half from the

northwest corner of Hubbard street and Wabash avenue after hitting plaintiff before it came to a stop, and when the passengers got off, plaintiff was lying near the pole with the white stripe, that is, the indicated stop sign which is at the corner heretofore described. The foregoing is gathered from the testimony of the plaintiff and his witnesses, viewed in a light most favorable to plaintiff. Much of it was controverted and no doubt vigorously denounced as untrue and unworthy of belief, but a jury and a judge have accepted it.

The argument of defendant is in essence that if a pedestrian makes a mistake in determining that he can safely cross or acts on the assumption that a streetcar will slow down or the motorman thereof will exercise care in looking out for passengers who may desire to board the car, he is guilty of contributory negligence. While undoubtedly there is some language in the earlier cases to support defendant's position, the cases of Gnat v. Richardson, 378 Ill. 626, and Moran v. Gatz, 390 Ill. 478, 486, have definitely settled that question to the contrary. In the latter case, it was said, "a pedestrian's failure to keep a constant lookout, or to look again after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law but it is a question for a jury whether he was in the exercise of ordinary care for his own safety." In the case of Kelly v. Chicago Surface Lines,

329 Ill. App. 651, plaintiff saw a streetcar coming, as in the instant case, and estimated that he had ample time to cross but the streetcar was going at such speed he was unable to do so and was struck. In that case Mr. Justice Scanlan stated this well-established principle: "The question of contributory negligence is one which is preeminently for the consideration of a jury, as such negligence cannot be defined in exact terms, and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of the jury. (Blumb v. Getz, 366 Ill. 273, 277; Moran v. Gatz, 390 Ill. 478, 486.)" It could not be otherwise in the City of Chicago. There are places in this city where streetcars are spaced as close as 20, 30 or 40 seconds apart. It would completely stalemate traffic if a rule prohibiting pedestrians from crossing in front of an approaching streetcar were literally applied.

It serves little purpose to review the many cases cited by defendant, some of which go back 40 years or more. Reliance is placed by defendant on the case of Rajck v. Cummings, 314 Ill. App. 465. There the injured party was dead and could not testify as to his conduct. Plaintiff administrator having doubt that he could prove due care, relied on wilful and wanton conduct, thereby intending to obviate the requirement of due care. The court held that failure of a motorman to keep a lookout adequate to observe persons crossing the street did not amount to wilful and

wanton conduct. In the case of Russell v. Richardson, 308 Ill. App. 11, the injured person was dead and testimony with respect to his actions was so scanty that the court did not feel it was adequate to prove due care. Moreover, in that case the court noted (pages 26 and 27) that plaintiff was struck before he was able to cross the first rail of the tracks. In the instant case, plaintiff was just clearing the last rail. Other cases cited by defendant involve crossing at steam railroad tracks; cases in which the trial court had directed a verdict; or cases in which the circumstances were substantially different from the case at bar. Defendant has also argued that the doctrine of the last clear chance is not recognized in Illinois but we do not see the relevance to the facts as we have set them forth heretofore.

The next point made by defendant is that the verdict is against the manifest weight of the evidence. We have already discussed the evidence on behalf of plaintiff. On behalf of defendant the only person who actually saw the accident was the motorman of the streetcar that hit plaintiff. He testified that when he was 30 feet or so from plaintiff, he saw plaintiff step off the east curbstone and go west. It was then that the motorman applied his brakes. When he said "thirty feet or so from him," the motorman must have meant 30 feet or so north of the point at which plaintiff stepped off the east curbstone. He said he kept ringing the gong and when plaintiff stepped into

his path, he was no more than 4 feet away from him; that the streetcar came in contact with him and he glanced off the right front and fell into the street; that the car was going about 20 miles per hour, and that it takes about 60 or 61 feet to stop; that his car had a fairly fast pick-up; that Hubbard street is a regular stopping place for streetcars if anybody is getting on or off a car. He was corroborated to some extent by George Rademacher, the motorman on a streetcar following his. Rademacher said he saw plaintiff "run off the sidewalk in the street." He did not see the collision. Defendant also draws some support for its position from the testimony of witnesses as to the precise place where plaintiff was lying after the accident. There is also considerable discussion of time and measurements by both sides. For example, plaintiff says that the motormen's testimony cannot possibly be true because if it were, then while the streetcar was going 20 or 22 miles per hour, plaintiff was stepping off the street 30 feet away and walked 28 feet 4 inches in the same time it took the streetcar to go 30 or 35 feet. Of course, defendant has an answer, but it is utterly futile for a reviewing court to make an appraisal of such evidence in a case of this character. Great allowance must be made for the advantages which the trial judge and jury had in their observation of witnesses and their ability to judge testimony from something more than the cold written page. It should be obvious from the foregoing summary that there was a genuine issue

of fact for the jury to decide, and that the verdict was not against the manifest weight of the evidence.

This brings us to the third point made by defendant, which is that it did not receive a fair trial because of errors in instructions. Nine instructions were given by the court on behalf of plaintiff and seventeen on behalf of defendant. In addition to the foregoing, the court modified an instruction offered by defendant and gave it as modified, so that in reality eighteen instructions were given on behalf of defendant, or twice as many as for plaintiff. In addition to those instructions given, defendant offered nine others, which the court refused. The refusal was obviously based on the fact that most of those presented were already covered by instructions given. As it stands, a total of twenty-seven instructions were offered on behalf of defendant and nine on behalf of plaintiff. The court was therefore called upon to pass on thirty-six instructions, the trial meantime being suspended and the jurors marking time in the jury room.

No complaint is made of the instructions given on behalf of plaintiff, and in defendant's brief it is only with respect to the refusal of three of the refused instructions that any argument is made. The first of these states that a <u>mere</u> failure to sound a warning gong would not be enough to make defendant liable. The use of the word "mere" in this instruction is in our opinion open to criticism. "Mere" carries a connotation that the

failure to sound a gong is of no particular consequence. In the case of Anderson v. Cummings, 325 Ill. App. 519, an instruction of this sort was given at the request of plaintiff. The court criticized the giving of it but said it was not reversible error. It was plaintiff's position that the ringing of a bell would have warned plaintiff of the motorman's intention not to stop at the indicated stopping point, and there is merit in that position.

Complaint is made of the refusal of an instruction on contributory negligence. This was amply covered by other instructions in the case.

Defendant complains of the refusal of an instruction to the effect that if a witness has been impeached by proof of different and contradictory statements, that should be taken into consideration in determining the value of the testimony of the witness. Plaintiff contends it has no application because none of plaintiff's witnesses were impeached. Defendant refers to two items of impeachment which this would cover, to-wit: plaintiff told an investigator for defendant that he did not know how the accident happened because he was knocked unconscious, and the witness Everage told an investigator he knew nothing about the accident as he was half asleep. Everage testified that all he knew was that he felt a bump and then heard the motorman put on his brakes. It does seem to us that the instruction had some, but not material,

application. In evaluating the importance of this instruction, we have in mind that unquestionably in their argument to the jury the attorneys, both of whom are experienced and competent in this field, discussed these matters of impeachment, and that after all, the instruction only tells what should be entirely apparent to an ordinarily intelligent person.

No jury trial is completely free of error and the question for a reviewing court is always whether there was reversible error. The refusal of these instructions does not constitute such error.

One other question remains for consideration and that is the argument of defendant that the opinion of the expert medical witness to the effect that plaintiff must have sustained amnesia as a result of this accident and therefore could not have a recollection of it should have controlled the verdict of the jury. Such opinion evidence is by no means binding upon a jury. They had the right to weigh it against plaintiff's testimony that he did remember.

In our opinion defendant received a fair trial and the verdict is amply sustained by the evidence.

Judgment affirmed.

Friend and Scanlan, JJ., concur.

45216

ISADORE H. BRAUN, Appellant,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
LOUIS G. NEIMAN, Appellee.	)	

348 I.A. 264

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover $2000 on a written contract for services as an architect in preparing for defendant sketches, plans and specifications for the erection of a dwelling place on a lot owned by defendant at 1032 Albion avenue in Chicago. Defendant filed a counterclaim to recover the sum of $400 paid by him to plaintiff on account of work performed under the agreement. Trial by the court without a jury resulted in findings and judgment for defendant and against plaintiff on his claim for services, and against defendant and for plaintiff on the counterclaim. Plaintiff appeals from the judgment against him.

The essential facts disclose that in the spring of 1947 defendant consulted plaintiff with reference to a residence that he wished to build, and delivered to him a survey of the lot upon which the proposed house was to be erected. Plaintiff then inspected the block on which the lot was located, examined fire maps to determine dimensions of other structures in the vicinity, surveyed without instruments the premises involved, and examined maps in the map department of the City of Chicago. There-

after he prepared a sketch of the proposed building which covered more of the lot than the existing zoning ordinance permitted. It is conceded that he was familiar with the provisions of the zoning ordinances. Between March and August 1947 plaintiff had several conferences with defendant and his wife regarding room dimensions and other matters pertaining to the structure, and various other sketches were submitted during this period. The final sketch was completed August 11. Previously, on July 17, 1947, after the preliminary sketches were prepared but before the final sketch was delivered, the architect sent his client a contract for signature which was signed and returned to plaintiff. This is the contract upon which suit is predicated. On August 11 defendant and his wife made certain suggestions with respect to the dimensions of rooms in the final sketch. Then, for the first time, plaintiff made mention of the zoning laws, telling defendant "that we would have to go to the limit permitted, and probably would have to have a zoning change to permit the maximum width," to which defendant made no reply. The architect then proceeded to prepare final plans and specifications conforming to the earlier sketches which were submitted to defendant about October 1947. Plaintiff solicited bids for the construction of the dwelling, and at the same time defendant submitted the final plans and specifications to a contractor named Christainson from whom he solicited bids. After consulting various

subcontractors Christainson advised defendant that since the plans were contrary to the zoning laws he would not bid on the work, and when defendant informed plaintiff of the refusal of the contractor to bid, he told defendant he would procure a variation order or ordinance. Following this conversation the architect asked for $400 on account, which defendant paid. No effort was made by plaintiff to procure such an order from the appropriate municipal authorities, probably for the reason that he felt his client was abandoning the project. The contract does not mention any stipulated price. Plaintiff testified that after he had obtained bids from various contractors he advised defendant the building was going to cost about $50,000. Defendant thought this was too much, and plaintiff then recommended various changes such as reducing the size of the rooms, changing the circular stairs for conventional stairs, omitting a number of interior features, changing the plumbing fixtures, etc. Plaintiff testified that defendant objected to these changes, and told him that he did not want to put up the dwelling unless he could have what he wanted at the price that he had in mind. At a conference in September 1947 he told plaintiff he would not build a house for $50,000 and "we are not going ahead with that kind of plan." Some time after the conferences with respect to the bids which disclosed that it would require a sum considerably in excess of what defendant was willing to pay, and after

defendant had refused to accede to a modification of the plans, plaintiff wanted additional money, but defendant told him, "I am not going to give you any additional money. I don't even know whether I am going to build a home on that according to those plans." The matter ended there. Defendant refused to discuss changes in the final plans or consent to any modifications thereof, and of course plaintiff made no effort to obtain a variation order. The dwelling was never erected, and thereafter suit was instituted on the contract under which plaintiff's compensation was fixed at eight per cent of a reasonable estimate of the total cost. Total cost was defined in the contract to be the cost of labor, materials and contractor's profits. The eight per cent compensation of the architect was apportioned among the different types of services to be performed by him as follows: (1) preliminary studies, two-tenths of eight per cent; (2) general drawings, three-tenths; (3) specifications, one-tenth; (4) detail drawings, one-tenth; and (5) general supervision, three-tenths. The first three items, amounting to six-tenths of eight per cent of the total cost, had been performed, and there had been earned six-tenths of eight per cent of the estimated reasonable total cost of the building when defendant in October 1947 decided not to build. This amounted to $2400, based on a $50,000 estimated cost of the building; $400 having been paid, plaintiff claimed a balance of $2000.

In justification of plaintiff's claim, the record warrants the conclusion that there had been considerable work done by him in settling on the final draft of plans. He had visited the lot and made a sketch of the block showing the location of different houses as they were standing on their respective lots in relation to lot lines, and sketched the proposed building on the plat. Sketches of the interior were made reflecting the desires of defendant and his wife, and the completed blue prints show stairways, closets, wash rooms, living room, dining room, kitchen, library room, reception hall, bedrooms, recreation room and garage at the various elevations, all of which were introduced in evidence. Before sketches and plans were approved, plaintiff and defendant visited other dwellings which plaintiff had built. Evidently defendant and his wife wanted the rooms to be of certain given sizes, and plaintiff testified that they insisted on certain sizes of rooms and certain arrangements after sketches had been prepared, all of which were carried into the final plans and specifications, so that the final plans were a reflection of the preferences of defendant and his wife. Plaintiff testified that he told defendant that the building would have to be of a certain width in order to accommodate rooms of the size defendant ordered, and that they would probably have to have a zoning change to permit the maximum width of the building as planned. He said he called that fact to the attention of defendant,

and said that when he pointed it out defendant and his wife made no comment and paid no attention to it. The trial judge found that the client was not fully informed that the plans were in violation of the building code or that defendant thoroughly understood that fact. It is inconceivable, however, that defendant, who was an experienced businessman, could have been unaware of this information which was given to him by plaintiff in the course of the transaction and repeated with the suggestion that a variation order could be obtained. There is evidence in the record that a large percentage of the homes in that vicinity were built on the full width of the lot line, and that the ordinance was later amended to remove this restriction. It is also significant that after the ordinance provisions and variation order were discussed, defendant paid plaintiff $400 on account of his services. Defendant contends, and the court evidently adopted the view, that an architect is not entitled to recover for his services when he draws plans or specifications which he knows are in violation of the city building code and a building cannot be completed unless a variation order is secured from the proper municipal authorities. In view of the fact that variation orders had evidently been secured on most of the buildings in that block, it was not and could not seriously be contended that it would have been difficult to obtain such an order with respect

to this dwelling. Plaintiff says that the reason he did not take steps to obtain such an order is that defendant refused to go ahead because the price of the bids exceeded what he wanted to pay. The controversial question presented at the trial and here, is whether defendant abandoned the project on account of cost, in which case it would have to be conceded that he became liable for the services rendered, or whether, as the court held, that plaintiff is precluded from recovering for the balance of his services because he prepared plans which violated the building code. In finding the issues against plaintiff the court relied principally upon Wolthausen v. Lederer (Abst.), 313 Ill. App. 143, and entered judgment accordingly. That was a suit to remove clouds on title wherein it appeared that a party leased premises under a short-term lease, with an option to buy. Although the lease contained no provision permitting remodeling of the premises, the lessee began to convert the house from a single-family dwelling into a two-family dwelling, without a building permit and in violation of a zoning ordinance as well. The lumber companies which furnished materials to lessee were charged with knowledge of the existence of the zoning ordinance, and could not claim a lien for materials furnished based upon its violation. In the same filing the first division also handed down an opinion in Fisher v. United States Fidelity & Guaranty Co., 313 Ill. App. 66, which involved the contemplated construction in Chicago

of a building to be used as a motion-picture theater within 145 feet of a church; the construction had been halted by the commissioner of buildings in accordance with the terms of an ordinance prohibiting motion-picture entertainment for profit within 200 feet of a church. Suit had been instituted by the lessors in an attempt to hold the surety company liable for the completion of the building, although the theater lease had been canceled. The court held that the harsh rule of law there contended for by plaintiffs' counsel had been somewhat relaxed, quoting from Restatement of the Law of Contracts (section 454, chapter 14, page 843) and 6 Williston on Contracts, revised edition (section 1931, page 5407), and citing Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt, 149 U.S. 1, The Kronprinzessin Cecilie, 244 U.S. 12, and Levy v. Rosen, 300 Ill. App. 523. The judgment of the trial court holding the surety company liable and denying it recovery on its bond, was reversed. Thus, in the Wolthausen case violation of an ordinance was penalized; in the Fisher case it was excused. But neither the Fisher nor the Wolthausen case involved an architect's fees, and the facts were entirely different. In the case at bar both parties knew of the zoning ordinance and made their contract accordingly, with a compensating provision for the owner to elect between his architectural preferences on the one hand and the ultimate cost on the other. This in effect posed a multiple-choice decision: the owner had the choice of abandoning the project because of the cost and paying the

architect for the services already rendered; of obtaining a variation order and proceeding with the plans as made, at the maximum cost; or, finally, of consenting to a modification of the plans so as to bring the dwelling within the provisions of the zoning requirements and in all likelihood put the cost in a lower bracket. This last alternative could have been achieved by effecting a slight reduction in the size of certain of the rooms in the front part of the building. The architect too, under the contract, had the right "to make such alteration in design, specification and size, or any of them, as shall make it possible to bring the cost within the restrictions imposed by the Owner prescribing ultimate cost," but the owner refused to permit any change in the plan. We think that in reaching his conclusions the able trial judge overlooked these contractual alternatives. Upon careful consideration of the issues involved we think defendant is not in a position to complain that the plans were unusable without exhausting his right to apply for a zoning variance which in all likelihood would have been allowed under the existing conditions in that neighborhood. Mr. Edward W. Parlee, an assistant corporation counsel who testified as an expert on zoning matters, stated that in his experience "in cases of variation where similar instances have been before the Board of Appeals they have usually granted such a variation." It is apparent from an examination of the record that defendant abandoned the project because the cost was too high,

as he had a right to do, but he should not be allowed to escape his liability under the contract to pay for services admittedly rendered. If the price had been satisfactory to defendant we have no doubt that he would have instructed plaintiff to obtain a variation order; but since, as we think, the project failed because of the cost there was no occasion for plaintiff to apply for such an order.

Accordingly, judgment of the Municipal Court is reversed and the cause remanded with directions that plaintiff have judgment for $2000 and costs, but without interest.

Judgment reversed and cause remanded with directions.

Schwartz, P. J., and Scanlan, J., concur.

45437

RUSSELL C. NELSON and HELEN E. NELSON, Appellants,	)	APPEAL FROM CIRCUIT
v.	)	COURT, COOK COUNTY.
McCABE DEVELOPMENT COMPANY, a corporation, Appellee.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Russell C. and Helen E. Nelson filed a complaint in the Circuit Court seeking specific performance of a written agreement entered into with the defendant corporation for the construction of a six-room residence on a parcel of land on Vine street in Park Ridge, Illinois. Issue being joined, the cause was referred to a master in chancery who recommended that the complaint be dismissed for want of equity and that the contract between the parties be decreed to be null and void and removed as a cloud upon defendant's title. The chancellor entered a decree in accordance with the master's recommendation, from which plaintiffs appealed direct to the Supreme Court of Illinois, where, upon consideration, it was held that no freehold was involved, and accordingly the cause was transferred here for determination. Nelson v. McCabe Development Company, Supreme Court Docket No. 31765, November 1950. As appears from the opinion of the Supreme Court, defendant neither filed a brief nor made an appearance in that court; and it adopted the same course of action or, more accurately, inaction, here.

The contract, which was executed May 12, 1945,

provided in effect that defendant should construct, upon the lot therein described, a residence in accordance with certain plans and specifications; that it should deliver the residence to plaintiffs completely finished and ready for occupancy on September 1, 1945; that plaintiffs should pay the sum of $12,500, $500 thereof in cash, receipt of which was acknowledged in the agreement, and the balance of $12,000 in small monthly installments extending over a period of many years. The complaint alleged payment of the initial $500 in cash. Although none of the monthly payments were made, plaintiffs contend that they were at all times ready, willing and able to perform and carry out their part of the contract.

From evidence adduced upon the hearing the master found that in the latter part of 1944 or early in 1945 plaintiff Russell C. Nelson sought to obtain housing accommodations from defendant, but that none were then available, and in the course of several conversations had with Owen J. McCabe of the defendant corporation, the latter told Nelson that there was a bill pending in Congress whereby a so-called GI could have a home built and finance it on a long-term payment basis. Nelson indicated an interest in this information, and the parties looked at several parcels of real estate in Park Ridge and Edison Park. Thereafter plaintiffs selected a lot on Vine street in Park Ridge, and then went to defendant's office, where Owen J. McCabe showed them plans for different types

of homes, one of which, designated as plan No. 3439, was selected by plaintiffs. They were then told that it would be necessary to secure a priority for the building of the home, and that Nelson was entitled to such priority because of his prior military service. An application for priority was thereupon prepared by McCabe, executed by Nelson, submitted to the War Production Board, and approved May 3, 1945. The contract on which plaintiffs sought specific performance was signed May 12, 1945. The construction contemplated by the contract was never commenced. The contract made no provision for financing. Shortly after July 4, 1945 McCabe rented a home to plaintiffs at 7520 West Devon avenue, which they have since occupied. The complaint was filed more than three years after the contract was signed. Plaintiffs contended before the master that after entering into the agreement, they made repeated demands on defendant that it carry out the terms, conditions and provisions thereof, but that defendant refused to do so.

The defense interposed was that the agreement was supplemented by an oral understanding, both prior and subsequent to the execution of the agreement, that it would be necessary to procure a loan or a commitment for a loan, within a reasonable period following May 12, 1945, for the full contract price, and that because a building loan could not be obtained, plaintiffs abandoned the undertaking, rented a home from the defendant corporation,

in which they continued to reside, and did nothing further until this suit was instituted. The master admitted evidence, over plaintiffs' objection, of the oral agreement which, if admissible, clearly showed that financing was contemplated by the parties, but never secured. McCabe testified that shortly after May 10, 1945 he asked Nelson to come to his office, where he informed him that it looked as if the deal was not going to "come to a head" because the necessary G-I loan could not be secured; that he also advised him that they would have a house for rent which would be reserved for Nelson and his wife, whereupon Nelson told McCabe that he would rather rent than go through with the contract; that early in June, when McCabe procured this home for rental, he talked to Nelson and again advised him that "the deal to construct the home was through and that they had this rental for him and after the lease for the rental was executed, Nelson said 'I am very, very glad you took care of me, because that house deal was going to run too much money and this is a whole lot better deal for me'"; and that thereafter neither plaintiffs nor anyone else ever discussed the agreement. Plaintiffs never sought the return of the deposit which they claimed to have made, but which the master found was not paid.

It was of course incumbent upon plaintiffs to prove the allegations of their bill by competent evidence. The master who heard the evidence and made a long and

painstaking report found the salient facts adversely to plaintiffs, and held that they had not sustained the burden cast upon them. He even found that the original $500, receipt of which was acknowledged in the agreement, was never paid, and that plaintiffs were unable to satisfactorily establish the source and origin of the amount which they claimed to have paid in cash on the contract.

Aside from the foregoing considerations, the general rule, subject to exceptions of course, is that contracts for building or construction or repair will not be specifically enforced. This is true in part because damages at law are an adequate remedy, and for the further reason that according to settled principles a court of equity will decree specific performance only when it can dispose of the matter in controversy by a decree capable of present performance, and will not decree a party to perform a continuous series of acts extending through a long period of time requiring constant supervision. 58 C.J. Specific Performance, secs. 279-287; and numerous cases in many jurisdictions cited in the footnotes.

In the light of these conclusions, we are of the opinion that the chancellor properly sustained the master's recommendations and dismissed the decree for want of equity.

Decree affirmed.

Schwartz, P. J., and Scanlan, J., concur.

428

45218

ARTHUR J. CLARKE, for the use of ROBERT WILKIE, Appellant, v. STANDARD ACCIDENT INSURANCE COMPANY, a corporation, Appellee.	APPEAL FROM CIRCUIT COURT COOK COUNTY

343 I.A. 235

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment in favor of the garnishee, the automobile liability insurance carrier of Sidney Weingart, the owner of an automobile driven by Arthur J. Clarke, against whom a judgment by default for $10,000 was entered.

The decision turns on whether Clarke was an insured within the provision of the policy, reading as follows:

> "III Definition of Insured *** With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission."

There is no contradiction in the testimony. Weingart kept his Dodge automobile in the Brompton Garage, located on the east side of north Broadway and about a block south of Addison street in Chicago. Clarke, the judgment debtor, was an employee of the garage, part of whose duties was to accompany the car owner to his home and then drive the

car back to the garage. On June 12, 1947, about 2 o'clock in the morning, Weingart drove into the garage and asked Clarke to accompany him to his, Weingart's home. Weingart's home was about two blocks from the garage, on Pine Grove avenue north of Addison street. On arriving at his home Weingart turned the car over to Clarke, who proceeded directly to the garage, entered and advised a fellow employee that he, Clarke, was going to a restaurant on Broadway about a block south of the garage. He then drove out of the garage and south on Broadway to its intersection with Cornelia, the first street south of Addison, or just beyond, when he struck and injured plaintiff. Suit was brought against Weingart, the Brompton Garage and Clarke. It was dismissed as to the first named defendants and judgment by default taken against Clarke. To collect this judgment the garnishment proceeding was instituted.

The trial court held that when Clarke entered the garage with Weingart's car his authority or permission to drive the car, except to place it in the garage, had terminated; that at the time of the accident Clarke was using the car without the permission, express or implied, of the owner. With this conclusion we concur. Clarke therefore was not an insured within the provisions of the policy at the time of the accident, and judgment notwithstanding the verdict was properly entered for the garnishee. Byrne v. Continental Casualty Co., 301 Ill. App. 447.

The judgment is affirmed.

AFFIRMED.

Feinberg and Tuohy, JJ., concur.

429

45304

HARRY J. GRAFF, Appellant, v. ARLINGTON SEATING COMPANY, a corporation; CARL M. EBITSCH, Factory Superintendent; and LOUIS REZNER, Appellees.	APPEAL FROM SUPERIOR COURT COOK COUNTY

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered non obstante veredicto for defendants in his action wherein he charged that, pursuant to a conspiracy of the defendants, the defendant Rezner "did on February 24, 1948," at the factory of defendant corporation, falsely and maliciously accuse plaintiff with having stolen $30 out of Rezner's locker. The jury returned a verdict of $5,000.

There is no evidence in the record of a conspiracy to utter the slanderous words charged. There is no evidence even tending to show that any person other than plaintiff heard the alleged slanderous words. In an action of slander it is necessary to prove publication--the utterance of the words in the hearing of a third person. Frank v. Kaminsky, 109 Ill. 26. Ralph Koceja, called by plaintiff, testified that Rezner told the witness that he, Rezner, had stated to plaintiff that plaintiff had stolen $30 out of Rezner's locker. The defendant Ebitsch testified that long after February 24, 1948 Rezner had stated to him that Graff had stolen $30 out of his, Rezner's locker. Each utterance of slanderous

words gives right to a separate action of slander. The slander on which plaintiff relies is alleged to have taken place on February 24, 1948. The date is not alleged under a videlicet and therefore must be proved as charged. Collins v. Sanitary District, 270 Ill. 108; Rose v. Mutual Life Ins. Co., 144 Ill. App. 434. The statements of Koceja and Ebitsch are not evidence that the alleged slander of February 24, 1948 was uttered in the presence of third persons.

The court correctly entered judgment notwithstanding the verdict. This judgment is affirmed.

AFFIRMED.

Tuohy and Feinberg, JJ., concur.

45304

HARRY J. GRAFF,
Appellant,

v.

ARLINGTON SEATING COMPANY, a corporation; CARL M. EBITSCH, Factory Superintendent; and LOUIS REZNER,
Appellees.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered non obstante veredicto for defendants in his action wherein he charged that, pursuant to a conspiracy of the defendants, the defendant Rezner "did on February 24, 1948," at the factory of defendant corporation, falsely and maliciously accuse plaintiff with having stolen $30 out of Rezner's locker. The jury returned a verdict of $5,000.

There is no evidence in the record of a conspiracy to utter the slanderous words charged. There is no evidence even tending to show that any person other than plaintiff heard the alleged slanderous words. In an action of slander it is necessary to prove publication--the utterance of the words in the hearing of a third person. Frank v. Kaminsky, 109 Ill. 26. Ralph Koceja, called by plaintiff, testified that Rezner told the witness that he, Rezner, had stated to plaintiff that plaintiff had stolen $30 out of Rezner's locker. The defendant Ebitsch testified that long after February 24, 1948 Rezner had stated to him that Graff had stolen $30 out of his, Rezner's locker. Each utterance of slanderous

words gives right to a separate action of slander. The slander on which plaintiff relies is alleged to have taken place on February 24, 1948. The date is not alleged under a videlicet and therefore must be proved as charged. Collins v. Sanitary District, 270 Ill. 108; Rose v. Mutual Life Ins. Co., 144 Ill. App. 434. The statements of Koceja and Ebitsch are not evidence that the alleged slander of February 24, 1948 was uttered in the presence of third persons.

The court correctly entered judgment notwithstanding the verdict. This judgment is affirmed.

AFFIRMED.

Tuohy and Feinberg, JJ., concur.

430 A

45324

DAVID N. WHITMORE, Appellee, v. CONGRESS HOTEL AND ANNEX, INCORPORATED, Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY

349 I.A. 266²

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $10,000 entered against it in plaintiff's action for personal injuries claimed to have been sustained in jumping from the room occupied by him as a guest in the south building of defendant's hotel to the roof of an adjoining building during a fire.

The amended complaint charges defendant with violating a statute relating to fire escapes on buildings four or more stories in heighth, with negligently failing to warn plaintiff in due time that the building was on fire, and in failing to notify the fire department in time to avoid the spreading of the fire in the building. The fire in question started some time between 6 and 7 o'clock in the morning of February 3, 1946. Plaintiff occupied a room on the 12th floor. Plaintiff claims that the fire started shortly after 6 o'clock. Defendant places the time at 6:40 a. m. The records of the fire department show notice to it at 6:44. Defendant contends that the fire did not go above the fifth floor, but plaintiff testified that smoke was entering his room through the door leading in from the hall.

This meager statement is sufficient to show a conflict in the evidence, raising questions of fact to be determined by a jury. As the case must be tried again, the evidence will not be detailed.

Defendant moved to strike from the complaint the charges relating to the violation of the statute. This statute expressly provided that it "shall not apply to cities, villages and towns within the State of Illinois that have passed and adopted or may by their proper legislative authority pass or adopt ordinances, by-laws or resolutions governing the kind, number, location, material and construction of fire escapes to be required on buildings within the corporate limits of such cities, villages and towns." The courts take judicial notice of the general ordinances of the City of Chicago, and our attention has been directed to numerous provisions of such ordinances relating to "the kind, number, location, material and construction of fire escapes to be required on buildings within the corporate limits." The trial court erred in refusing to strike this portion of the complaint. This error was aggravated by the giving of an instruction in the language of the statute fixing a duty upon the defendant.

Other errors are assigned and argued by defendant relating to the refusal to permit the filing during the trial of an amended answer setting up the defense of non-liability because plaintiff, his employer and defendant were at the time of the alleged injury subject to the

provisions of the Workmen's Compensation Act, alleged errors relating to the introduction of evidence, and the conduct of plaintiff's counsel. Permission to file the amended answer should be granted. The case must be remanded for a new trial because of the errors relating to the statute. The other errors complained of will probably not arise on a second trial.

The case is reversed and remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

Feinberg and Tuohy, JJ., concur.

431 A

45312

EMIL and MARJORIE FERRO, Appellees, v. JOHN P. DAROS, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This cause was here on a prior appeal (333 Ill. App. 386), where we remanded the cause for trial upon the issues raised by the pleadings. Upon remandment a jury was waived, the cause was heard by the court and judgment entered for plaintiffs in the sum of $650, finding the issues on defendant's counterclaim against defendant, from which judgment defendant appeals.

No transcript of the proceedings is included in the record, and we must assume that the evidence justified the findings of the trial court. Jaffe v. Tenenholtz, 333 Ill. App. 357.

Defendant contends, however, that the answer set up affirmative defenses, to which there was no reply, and therefore the facts stand admitted. Where the parties proceed to trial without a reply to the answer and introduce evidence of such affirmative defenses, the formal reply to the answer is thereby waived. Cienki v. Rusnak, 398 Ill. 77, 89.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Niemeyer, P. J., and Tuohy, J., concur.

432

A

45307

VERNON B. SMITH, Appellee, v. CIVIL SERVICE COMMISSION OF THE CITY OF CHICAGO, et al., Appellants.	APPEAL FROM SUPERIOR COURT COOK COUNTY

343 I.A. 267

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, while a police officer of the City of Chicago, was tried before the Civil Service Commission of the City of Chicago and found guilty of violating sections 3, 4 and 5 of Rule 389, Rules and Regulations of the Department of Police, as follows: Section 3, conduct unbecoming a police officer or employee of the Police Department; Section 4, immoral conduct; Section 5, neglect of duty. On a review by certiorari the Superior Court quashed the findings and return of the Civil Service Commission, holding that the defendants did not have jurisdiction in the matter in that plaintiff was treated in a manner different from other policemen solely because he was a Negro. Appeal is taken from the judgment of the Superior Court of Cook County.

Before reviewing the facts in this case, it is well to call attention to the narrow limits to which courts of review are confined in examining findings of the Civil Service Commission. In Hopkins v. Ames 344 Ill. 527, at page 531 the court said:

> "'* * * The court has no power to pass upon the findings and conclusions of the inferior tribunal [Civil Service Commission] but it may examine the proceeding to determine whether the inferior tribunal had jurisdiction, and the facts upon which the jurisdiction is founded must appear in the record, which also must show that the inferior tribunal acted upon evidence. If the inferior tribunal had jurisdiction to hear and determine the case and it proceeded legally, the court is powerless to review the order on the ground that the inferior tribunal wrongfully removed the defendant from office.--People v. City of Chicago, 234 Ill. 416; Joyce v. City of Chicago, 216 id. 466; City of Chicago v. People, 210 id. 84; People v. Lindblom, 182 id. 241; Wilcox v. People, 90 id. 186.'"

In Cartan v. Gregory, 329 Ill. App. 307, this court elaborated upon this principle, saying (p. 318):

> "Where it is claimed that there is no competent evidence to support the finding of the Commission, the evidence upon which it acted should be reviewed by the court to determine that question. Such a review is not a weighing of the evidence, but a review of a question of law."

Here the return of the Civil Service Commission shows that specific charges were filed against Smith; that he was served with notice; that he appeared in person and by counsel; that evidence was heard on the charges and that he was found guilty. The record shows that the Civil Service Commission had jurisdiction of the parties and of the subject matter. Our inquiry is therefore limited to the question of whether or not the Civil Service Commission acted upon competent evidence. It is to be emphasized that we have no right to weigh the evidence. If there is any evidence in the record tending to support the finding of the Commission, the finding must be upheld.

The principal witness against Smith was a prostitute, one Jean Drum, who at the time of the hearing was living at a hotel on Chicago's south side. She testified that she was acquainted with Vernon Smith and his wife, Boots Smith, and identified Vernon Smith in the courtroom; that from time to time Mrs. Smith rented her a room in the house where Vernon and Boots Smith lived, for the purpose of commercial immorality; that it was the practice for Boots Smith to call the witness to come over when there was a customer available and that she paid Boots Smith for the room so used; that on December 14th she saw Vernon Smith at the house when she arrived and that he was present when Boots Smith requested her to perform a particularly flagrant act of immorality; that on this occasion Vernon Smith called one of two men who were engaged in the immoral act to come to the house for that purpose; that Boots also talked to the man in Vernon Smith's presence; that later when payment was discussed it was in the presence of Vernon Smith. The witness further testified that she made several other visits to the Smith home and that Smith was present on some of these occasions; that Vernon did not have much to say but he sat there playing cards; that there were always a number of people there, both men and women; and that Vernon Smith was not in his uniform. The testimony indicates that on these occasions she went there for the purpose of practicing prostitution. Under vigorous cross-examination her story was substantially unaltered.

The story of Jean Drum is corroborated by certain facts and circumstances. She drew an accurate floor plan of plaintiff's apartment at 6160 South Parkway, indicating that she was familiar with the apartment. She identified Vernon Smith out of a group of thirty men as the man who was present in the apartment at the time she responded to a call for an immoral purpose. It was agreed by Smith's own counsel that Smith's wife Boots, with whom he was living, had been convicted as a keeper of a house of ill fame.

One of plaintiff's neighbors testified that she saw numbers of people, Chinese, colored and white, going into the house at night; that she heard vulgar language coming from the apartment. Another neighbor testified that often at three or four o'clock in the morning various persons, Chinese, white and colored, would ring witness's doorbell and ask for Boots, stating that a cabdriver had brought them over looking for girls; that there was a juke box in the Smith apartment and that there was dancing and noise there until five or six o'clock in the morning; that there were women constantly going up to the apartment; that they made noise and that there was cursing and talking; that she saw intoxicated men go up there; that she made complaint to the landlord several times; that on one occasion she called the police at two o'clock in the morning, but that the police did nothing about it; and that the landlord said he would see Vernon Smith.

Smith himself admitted that there was a juke box in the apartment, although he denied that he served whiskey.

He explained the neighbors' testimony on the ground that the landlord wanted to get them out of the apartment. He stated that he paid $400 for the juke box, and that he bought it because he wanted a combination machine and could not buy one during the war.

The testimony and corroborative circumstances constituted evidence from which the Civil Service Commission could conclude that Smith was living in a house of prostitution conducted by his wife; that he made no attempt to interfere with the illegal acts committed in his presence; that on at least one occasion he aided in the commission of such illegal act; and that he thereby was guilty of conduct unbecoming a police officer. In view of the charge made that plaintiff was discriminated against because he is a Negro, we have meticulously scrutinized this record, and we find not one scintilla of evidence upon which any such fact or inference could be based. Accordingly, the judgment of the Superior Court of Cook County is reversed and the decision of the Civil Service Commission affirmed.

REVERSED.

Niemeyer, P. J., and Feinberg, J., concur.

433

45327

FRANK BROGNI, doing business as TAX SERVICE & LOAN CO., Appellee, v. MAURICE GOLDENBERG, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

340 I.A. 268

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his statement of claim in the Municipal Court of Chicago against defendant, alleging that defendant made and delivered a certain check in writing in the sum of $1300, drawn on the First National Bank of Chicago; that said check was made payable to "cash" and thereafter was negotiated and delivered, and came into the possession of the plaintiff, who is the lawful owner and holder for value; that after defendant caused the check to be negotiated he ordered and directed the drawee bank not to pay the same and said bank refused to pay it, to the damage of plaintiff in the sum of $1300. In his amended defense defendant admits the execution of the check, which he alleges was delivered to one Emanuel Candell as earnest money in payment of a piece of real estate upon condition that a written contract for the purchase of said real estate be entered into within one day, and alleges that Candell refused, without cause, to enter into said contract, but fraudulently conspiring with plaintiff to defraud defendant, caused the check to be transferred to plaintiff and caused the plaintiff to institute the proceedings without cause

or right; that Candell paid no consideration for the check; that plaintiff is not an innocent third party for value, but on the contrary is holding the check for the use and benefit of Candell. Further defenses raised are the statute of frauds and that because the check was made payable to "cash" it is not a negotiable instrument.

A jury demand was filed on behalf of defendant. On defendant's motion Candell was made a third party defendant to the cause. On April 3, 1950, on motion of plaintiff to strike the defense and for judgment, said motion was sustained and a judgment entered finding the issues against the defendant and assessing plaintiff's damages at the sum of $1300. On the 23rd day of June motion was made and overruled, to vacate the judgment of April 3, 1950. Defendant appeals from the judgment order of April 3rd and from the order overruling the motion to vacate.

Plaintiff takes the position here, and which is apparently the theory adopted by the trial court, that a negotiable instrument lawfully in the possession of a holder for value is not subject to a defense of fraud alleged to have been perpetrated on the maker after the execution and negotiation of the instrument, and that fraud is not a defense against the plaintiff, a bona fide holder for value, unless the maker was deceived as to the effect of his act. However sound these general principles of law may be, they are not applicable, for the issue here is whether or not the plaintiff is a bona fide holder for value. The amended

affidavit of merits challenges this fact. Defendant filed a jury demand and he is entitled to have this question of fact determined by a jury. As to the other defenses raised by the pleadings, we find them to be without merit.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Niemeyer, P. J., and Feinberg, J., concur.

45272

WORLD WINDOW CLEANING COMPANY, an Illinois corporation, Appellant,	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	)	
WALTER BERWICK, Appellee.	)	

343 I.A. 268

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is a suit by plaintiff, a window-washing contractor, against its former employee, seeking to enjoin him from rendering window-washing services for any former customers of plaintiff, who plaintiff alleges, refused to renew their contracts with plaintiff because of misrepresentations made by defendant. The complaint also prayed that defendant account to plaintiff. The misrepresentations charged are that for several years prior to commencement of suit defendant while in the employ of plaintiff had falsely represented to plaintiff that he would require an increase in compensation for cleaning windows of certain customers; that this resulted in plaintiff's asking for an increase in contract prices from customers and that when the customers refused to renew their contracts, defendant would perform the services at the old rate. The complaint did not state names of customers, but alleged that they were known to defendant. Defendant denies these allegations. He also asserts that there was no contract between himself and plaintiff for the exclusive use of his services and that he was available to others as well as to plaintiff for

window washing. He admits he washed windows for some customers, but avers he was hired by them without any misrepresentations on his part. The issue being made, the case was referred by the chancellor to a master, who heard the evidence and made a report finding the facts in favor of defendant and against plaintiff and recommending that the complaint be dismissed for want of equity. The chancellor overruled exceptions and entered a decree approving the report. Unless the findings of fact are against the manifest weight of the evidence, they must be sustained. (Schmalzer v. Jamnik, 407 Ill. 236, and cases there cited.) We find that the evidence amply supports the master's findings and the decree.

The report of the master shows that defendant was employed as a window washer by plaintiff for some twenty-seven years; that plaintiff would procure contracts for window washing on the basis of estimates as to the time required for a window washer to do the work and would then add 100% to that figure. The master further found that there was no agreement between plaintiff and defendant that defendant would not render any service or do any work for any other person or persons. Although the records kept by plaintiff indicate that defendant was paid on an hourly basis for a certain number of hours he was supposed to have worked each week, the conclusive evidence shows that defendant was actually paid by the job and not for hours of work. Plaintiff was not concerned whether

it was necessary for defendant to spend more or less than the number of hours shown on plaintiff's records as having been expended by him in the performance of his work. Defendant did not report daily for work but at varying intervals. Thus, defendant's relationship with plaintiff had some of the aspects of a subcontractor, although he was an employee in the sense that plaintiff withheld social security and federal income taxes and did other things incidental to the relationship of employer and employee.

The particular matters complained of are four in number, as follows:

In 1944 plaintiff contracted with the Nye Tool Company for cleaning the windows of its factory. The Nye Tool Company asked plaintiff to also give it a quotation on washing the windows of its office building. It was informed by plaintiff that because of a shortage of help, plaintiff could not take on any additional work. The Nye Tool Company then asked defendant if he would do the work after his regular hours of employment and on Saturdays and Sundays. This he did, and was paid $225.00 per year.

The Y.M.C.A. had been a customer of the plaintiff but had ceased using plaintiff's services in April 1943. In 1945, about two years later, the Y.M.C.A. contracted with defendant to do the job at $70.00 per month.

In 1948 Atlas Collapsible Tube Co. and plaintiff cancelled their contract, and defendant was hired to do the work for $5.00 a month.

On October 16, 1948 plaintiff notified Scholl Mfg. Co. Inc. that its price would be increased and thereupon, on October 29, 1948 Scholl cancelled its contract. On November 3, 1948 defendant contracted to do the work for Scholl Mfg. Co. Inc. for $200.00 a month. Defendant testified that he never advised plaintiff to increase its price to Scholl; that in fact he cautioned plaintiff against it; that it was not until after Scholl had cancelled its contract with plaintiff that he agreed to wash windows for Scholl; that after he had undertaken the work for Scholl he went in to see Mr. Minnis, vice-president of plaintiff company, told him he was doing the Scholl job and asked whether he wanted him to continue washing windows for plaintiff, to which Mr. Minnis replied "Yes." Defendant stayed on the job from the time of that interview in early December until February 25, 1949 when he was served with summons in this suit; that it was never suggested by plaintiff that the defendant turn over the Scholl contract to plaintiff or that he account for any profits therefrom. The evidence does not support the charge that defendant obtained any of these customers by misrepresentations, as charged in the complaint. Over a period of five years ending December 1948, plaintiff paid defendant an average of $5000 per year for his services, and defendant earned an average of $400 per year from other sources.

Plaintiff relies principally upon the famous case of Davis v. Hamlin, 108 Ill. 39, where the manager of a

theater, knowing the lease was about to expire, arranged with lessor to procure the lease for himself. In that case the court, describing defendant as a "confidential agent," said that the principle that an agent owes his principal the right to preserve the good will of the business was not limited to the conventional confidential relationships such as trustee and beneficiary, or guardian and ward, but "it is the nature of the relation which is to be regarded, and not the designation of the one filling the relation." These are words to be borne in mind in considering this case. The relationship between plaintiff and defendant in the instant case was designated as that of employer and employee, but, as we have heretofore pointed out, it had some of the aspects of subcontracting and those are the aspects most important for consideration here. The evidence conclusively supports the finding that plaintiff did not dictate the hours of work for defendant but paid him by the job and was concerned only in knowing that he had satisfactorily completed the work for the customer. That put defendant on his own and the master and the court properly found that he had the right to do work for others.

Plaintiff refers to the case of Tinkoff v. Wyland, 272 Ill. App. 280. There the parties involved were accountants. Defendant when designated by his employer to negotiate a contract, negotiated it for himself. The distinctions are obvious. All the other cases cited by

plaintiff involve relationships so different from the case at bar that it would be an extraordinary extension of the principle to apply it to this case. Moreover, the case of American Cleaners & Dyers v. Foreman, 252 Ill. App. 122, reviewing all the cases pro and con, has explicitly held "that, in the absence of an express contract, equity will not enjoin a former employee from soliciting the employer's customers whom he served during his employment, where, as here, no list of names was taken * * * and no fraud was committed * * *."

The granting of a writ of injunction is an extraordinary remedy and in determining whether or not it should be issued, courts take into consideration the effect upon the respective parties of the issuance of a writ. What would have happened here if the chancellor had granted the prayer for an injunction? Defendant would have been enjoined from washing windows for these customers and thereby deprived of a part of his livelihood. Plaintiff would not have regained these customers, and would not have benefited thereby. As to an accounting, the prayer in the complaint which is in the record (not correctly stated in abstract through apparent typographical error) is that defendant be required to account to plaintiff for all moneys received and collected by defendant from any former customers of plaintiff whose nonrenewal of contractual relations with plaintiff was caused by defendant's conduct while in plaintiff's employ. The master properly found that none of these former customers of plaintiff discontinued or

failed to renew their contracts with plaintiff because of defendant's conduct. But if there were an accounting, would a court of chancery decree that all the pay which defendant received for washing windows should be turned over to plaintiff, as plaintiff prays? Such a harsh result could certainly not be contemplated in equity. Would the court give his "profits" to plaintiff? There are no profits to defendant, in the same sense in which a business man might make profits, because all his compensation is the result of his labor.

The chancellor taxed all costs against defendant, although finding all equities in his favor. On what basis this was done does not appear. We surmise from experience in the trial courts that with the congested calendars, the chancellor considered this a conciliatory move that might terminate this litigation. However, we cannot see how any sound discretion could do otherwise than tax the costs against plaintiff. All costs, therefore, in this and in the trial court are hereby taxed against plaintiff and the decree is in all other respects affirmed.

Decree affirmed.

Friend and Scanlan, JJ., concur.

45322

DOROTHY NOVAEZ, Appellee,	)	APPEAL FROM SUPERIOR
v.	)	COURT, COOK COUNTY.
DONALD FALK, Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On the night of February 25, 1944 defendant's automobile ran into plaintiff on U.S. Highway No. 30, known as Roosevelt road, crushing her against another car and causing injuries which necessitated the amputation of both legs. Her suit for damages resulted in a verdict and judgment for $18,000, from which defendant has taken an appeal. At the close of all the evidence the court allowed defendant's motion to strike the portion of the complaint which charged defendant with wilful and wanton conduct, and plaintiff has assigned cross-error as to that ruling.

It appears from the evidence that plaintiff lived with her husband and child at her father's home at 1319 Mandel avenue, Westchester, a western suburb of Chicago. Shortly after eight o'clock of the night in question plaintiff's father was going to drive her and her husband to a store in Bellwood. Her father's car, a 1940 Plymouth sedan, had been standing in front of the house for the better part of a week, and he could not start it. Plaintiff and her husband began to push the car, her father remaining at the wheel. The car was facing north on Mandel avenue,

headed toward Roosevelt road. They got too far out on Roosevelt road, a four-lane highway, and in order not to interfere with traffic along that highway they pushed the car to within ten to twelve inches of the south edge of the pavement and about one hundred and fifty feet east of Mandel avenue. Two red taillights were lit on the car. Plaintiff had been pushing on the right side, her husband on the left. While they were pushing the car plaintiff crossed from the left to the right side of the car, borrowed her husband's handkerchief to wipe off her hands, returned it to her husband, and then recrossed to the south side of the car. Defendant was driving a 1934 Ford with four other high-school boys from Batavia to the Palace Theater in Chicago. There was a drizzle, and it had been foggy, but the fog cleared up east of Wolf road, which is three to five blocks west of the site of the accident. After passing another eastbound car defendant's automobile was driven in the right-hand lane. It was Herbert Handle, proceeding in the same direction, who was passed by defendant before the accident. He testified that he was driving thirty to thirty-five miles an hour, and that defendant's car was going eight to ten miles an hour faster. Plaintiff's father, Ignatz Trzinski, estimated the speed of defendant's car at fifty miles an hour, while her husband, Paul Novaez, put it at forty-five to fifty miles an hour. There was evidence that defendant was driving with two yellow foglights and no white headlights at the time of

the accident. He struck the rear of the Plymouth car as it was being pushed, crushing plaintiff between the two cars, and shoving the Plymouth ten to twelve feet south of the edge of the pavement and approximately sixty feet from the front end of the Ford. Defendant's witnesses denied that he was driving at the rate of speed testified to by plaintiff's witnesses, stating rather that he was driving only twenty to thirty miles an hour. There was also a conflict in the evidence as to whether the taillights on the Plymouth were lit; and likewise a conflict as to whether defendant had his white headlights in use at the time of the accident. Plaintiff's husband and her father both testified that defendant's car had foglights but no white headlights burning, whereas defendant and the occupants of his car all stated that the headlights as well as the foglights were burning. Gould, who was sitting next to the Ford driver, testified that immediately "previous to the collision [he] saw absolutely nothing." Defendant stated that at a distance of about twenty to twenty-five feet his "lights picked up a dark object." Plaintiff argues that this was probably due to the fact that only the foglights were burning. There was evidence that ordinary white headlights reflect against the fog and make it difficult to see, and plaintiff's counsel argues that it was a fair inference that defendant had turned off his white headlights because he thought that in the heavy fog he could see better without them. The fog had evidently

lifted when defendant's carreached Wolf road--Handle so testified and stated that it was clear to the east thereof--and the jury may well have believed that defendant forgot or neglected to turn on the white headlights after he emerged from the fog. Otherwise it is difficult to understand how defendant could have failed to see the Plymouth, with plaintiff and her husband to the rear thereof, especially with two taillights burning, as plaintiff's witnesses testified.

It is first urged as ground for reversal that plaintiff failed to establish her allegations of defendant's negligence. There was a conflict in the evidence as to whether defendant was driving without headlights and at an excessive rate of speed, but these were questions of fact presented to the jury for determination. On motion for a directed verdict "the evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence,--we can look only at that which is favorable to appellant." (Hunter v. Troup, 315 Ill. 293; and quoted with approval in Blair v. Blair, 341 Ill. App. 93.) The evidence most favorable to plaintiff shows that she and her husband had pushed the disabled Plymouth sedan onto Roosevelt road, a four-lane highway, and in order not to have the car interfere with traffic they had pushed it to

within ten inches of the south edge of the pavement; that the car's two red taillights were on; that plaintiff, who had been pushing on the right side of the car, for the purpose of borrowing a handkerchief from her husband, crossed over to his, or the left, side of the car, wiped her hands with the handkerchief, returned it, and was recrossing to her side of the car when defendant, after passing another eastbound car, drove his Ford, burning two yellow foglights but no white headlights, into the right-hand lane at fifty miles per hour, and struck the rear of the Plymouth car, shoving it so that after the accident it was ten to twelve feet south of the edge of the pavement and sixty feet from the front end of the Ford. We think it was clear that this was credible evidence from which the jury could have found that defendant was negligent.

The principal controversy grows out of defendant's contention that plaintiff was contributorily negligent as a matter of law, and that her negligence was the proximate cause of the accident. It is well settled that contributory negligence is ordinarily a question of fact for the jury, and "it has been repeatedly held that before contributory negligence can be said to have been established as a matter of law the conduct of the injured party must have been so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent." McNally v. Chauncy Body Corp., 315 Ill. App. 190. Defendant relies principally upon Illinois Central

R.R. Co. v. Oswald, 338 Ill. 270, and Cox v. Kroger Co., 179 F.2d 382. In the Oswald case plaintiff and her husband were driving east on a winter night across a bridge under which the railroad company had several tracks, and observed a large volume of dense black smoke ahead of them, the smoke coming from one of the railroad engines. The Oswalds stopped about thirty feet from the smoke and waited five or ten minutes for it to clear away, when the wind suddenly changed and blew the smoke over them, and about a second later another car came up from the west and struck their car. Mrs. Oswald went to the rear of their car to see if any damage had been done, and while she was between the two cars a third car came up and struck the second, forcing it forward, catching Mrs. Oswald between the first and second cars, and severely injuring her. The evidence in that case disclosed an abject admission of contributory negligence on the part of plaintiff, who conceded that "it was done carelessly. I see that now." She testified that "when I went in there I went in knowing that this smoke was obstructing cars and anything else on the bridge. I went in there knowing that other automobiles might come along on the bridge." One collision had already occurred, and Mrs. Oswald knew that the extreme lack of visibility presented the possibility of another. In the case at bar, however, the car being pushed by plaintiff and her husband was lighted and visible, and she had a right to rely on the probability that approaching cars on a wide highway would

steer to the left and avoid hitting her. The basis of Mrs. Oswald's attempted recovery was not the negligence of the automobile driver who was responsible for her being caught between the two cars, as in the case at bar, but the negligence of defendant in causing a large volume of dense smoke which obscured the view of automobile drivers; and in order for defendant's negligence to have been actionable in that case it was essential that "the injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence." Cox v. Kroger involved largely a question of the effect of a statutory violation under a factual situation which is essentially different from the case at bar. Under the clear weight of authority in this state we would not be justified in holding upon the record presented that plaintiff was guilty of contributory negligence as a matter of law. In Blumb v. Getz, 366 Ill. 273, plaintiff had a verdict and judgment which was reversed in the Appellate Court without remanding upon the ground that there was no evidence tending to prove due care on the part of plaintiff's intestate, but the Supreme Court reversed that judgment, finding that the trial court had properly submitted the issue to the jury. Plaintiff's intestate, upon discovering that he had lost one of his gloves while walking along a State highway, retraced his route some two hundred feet and was in the act of crossing

toward the center of the road to retrieve the glove when he was struck and killed by defendant's automobile. The Supreme Court said that it was not negligence per se for a pedestrian to be upon the highway, and held that the jury was justified in taking into consideration in its deliberations the fact, if it was a fact, that the pedestrian may have observed the coming automobile and believed that if it observed the speed law he would have ample opportunity, with safety, to step into the highway for the purpose of recovering the glove which he had dropped, and that if the automobile was far enough away at the time to justify a person in the exercise of ordinary care to have acted as did plaintiff's intestate, it would not necessarily indicate such a lack of care on his part as would amount, in law, to negligence. "The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. It can not be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case." Stout v. Skinner, 283 Ill. App. 330, in which the court quotes at length from Dickerson v. Mutual Grocery Co., 100 N.J.L. 118, 124 A. 785, which is similar on the facts to the Stout case and the case at bar, McNally v. Chauncy Body Corp., supra, Sances v. D'Angelo, 338 Ill. App. 199 (Abst.), and Holman

v. Uglow, 137 Ore. 358, 3 P.(2d) 120, are to the same effect. In the last of these decisions Holman died as the result of injuries sustained when he was struck by defendant's automobile on a dark and rainy night as he was pushing a car, out of gasoline, along a highway. The court concluded that he was not guilty of contributory negligence as a matter of law, and in reaching that conclusion said that "in determining what constitutes reasonable care, Holman had a right to bear in mind that the car itself was of a considerable size and, being of a light color, could be seen from the rear by a car equipped with proper lights. Its red illuminated tail-light would obviously cause him to believe that an effective warning signal was properly displayed. * * * Moreover, Holman, if he was exercising reasonable prudence, was not bound to anticipate negligence upon the part of the approaching car and, in the absence of circumstances which would afford notice to the contrary, had a right to expect and act upon the expectation that the Marmon [defendant's car] would exercise reasonable care, observe the rules of the road, and steer to the left at the appropriate time so as to avoid a collision with himself and the car he was shoving." In harmony with these decisions and the facts disclosed upon the hearing we think it would have been error for the court to have directed a verdict in favor of defendant.

The case was fairly tried and properly submitted to the jury upon the questions of negligence and contributory

negligence, and no point is raised as to the assessment of damages. The judgment entered upon the verdict should therefore be affirmed. The cross-error assigned by plaintiff for striking the portion of the complaint charging wilful and wanton misconduct on the part of defendant need not be considered since it is urged only in the event that we had seen fit to reverse the judgment and remand the cause for a new trial

Judgment affirmed.

Schwartz, P. J., and Scanlan, J., concur.

442 A

45244

DAVID CHERTOW, Appellee, v. HARRY C. COHEN, H. MARKHAM and HILDA MARKHAM, d.b.a., H. MARKHAM & CO., a copartnership, and also d.b.a., MARATHON WATCH CO., a copartnership, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The decree in this case overruled the exceptions to the Master's report and found that David Chertow, Harry C. Cohen, and a partnership consisting of H. Markham and Hilda Markham, doing business as Marathon Watch Co. (whom we will call Markham), were joint venturers in the importation and sale of watches from Frey & Company of Switzerland; that the profits were to be divided 50% to Markham, 25% to Harry C. Cohen, and 25% to David Chertow, and that no accounting had been rendered by Markham to Chertow and Cohen. The decree directed Markham to make full and complete disclosure and accounting in accordance with the court's finding. The case was re-referred to the same master for the purpose of taking an accounting, and it has proceeded before the master during the pendency of this appeal. From the decree ordering the accounting Markham took an appeal. Defendant Cohen, who filed a counter-claim for accounting from Markham, did not appeal and is therefore bound by that decree. No question of law is involved in this case. It turns entirely on issues of

fact and as the court has approved the master's report, the findings of fact must now be accepted by this court, unless they are against the manifest weight of the evidence. Schmalzer v. Jamnik, 407 Ill. 236, and cases there cited.

Separate and conflicting accounts of the facts in this case were related by each of the three parties involved, Chertow, Cohen and H. Markham. The evidence on behalf of Chertow is supported by his own testimony and by numerous cablegrams and letters. His account, which is the one the master believed, is that he, a diamond merchant, knew Cohen, a watch salesman, for many years; that Cohen had a contract with the firm that had the representation of Eterna watches; that this contract being about to expire, Cohen was looking for a new association, and that he and Chertow entered into an agreement whereby Chertow would undertake to negotiate with Frey & Company for the importation of Frey watches. It was agreed that Cohen and Chertow would split the profits on a 50-50 basis. Accordingly, on January 31, 1942 a letter was sent to Frey & Company signed David Chertow "by H.C.C." (being Cohen's initials) requesting a catalogue and prices. After that followed a series of letters and cables which finally resulted in the first shipment of 1800 watches by Frey & Company. This was a period in which watches were difficult to get and easy to sell. In order to get the watches into the United States

it was necessary to do two things: first, to obtain a "symbol," and second, to make payment therefor by way of a letter of credit or other suitable means of providing foreign exchange. A symbol was a distinguishing mark which, pursuant to agreement between Switzerland and the United States, every importer had to have in order to receive watches here. The symbols were alloted in Switzerland, and, as there was a great demand, were not easy to get. For some time over a period of several years, Chertow and Cohen together and separately attempted to enlist some firm which had a symbol and which would also provide the necessary financing. Finally Cohen produced Markham. According to Chertow, he and Cohen went to Markham's office together and there it was agreed that Markham would provide a symbol and get a letter of credit from the bank; that he, Markham, would get 50% of the profits; and that the balance would be divided 25% to Cohen and 25% to Chertow. It was agreed that they would import any kind of watches, either ladies' or men's. It was explained to Markham that 1800 watches were then being offered by Frey & Co. and Markham told Chertow to cable Frey to ship the 1800 movements under the Markham symbol. Chertow did cable Frey. The watches duly arrived in 1944. Markham, Cohen and Chertow went to the bank, where the necessary arrangements were made and the watches were then delivered to Markham. These 1800 watches were only movements, and it was necessary to get cases for them. Chertow while in

New York about that time phoned Markham that he could get cases at $2.85 apiece, but Markham told Chertow he wanted to get them for less. Thereafter, sale of the 1800 movements was undertaken, and many other watches, the precise amount being unknown and dependent upon the final accounting, were received from Frey & Company and sold through Markham. It is a complete accounting in this respect for which this suit was brought.

Markham's story is that he was dealing only with Cohen; that Chertow "just tagged along;" that he did not know that Chertow had any interest in the matter; that his deal with Cohen was only with respect to the 1800 watches, and that he has already paid him that or more.

Cohen's story seems to be in substance that while he did have a deal with Chertow, as stated by Chertow, this deal was renounced by Chertow because he was not only to negotiate or permit his name to be used in the negotiations, but was also to arrange the financing. Cohen, however, does agree with Chertow that the deal with Markham covered all watches imported. It is not denied that for a considerable time after the date on which Cohen says Chertow renounced the agreement, Chertow continued his interest in the matter and that the negotiations continued in Chertow's name. It appears clear that Markham knew that the negotiations were in Chertow's name and that he must have known Chertow was in the arrangement, all of which lends support to Chertow's account, rather than to Markham's.

The master who saw and heard the witnesses felt that Markham's testimony was discredited by previous testimony he had given in a deposition. Markham took the position on the hearing before the master that Cohen was merely an employee, but it appeared that he was not treated as an employee by Markham with respect to the withholding of income taxes or the making of social security payments. Also, Markham testifying at the taking of the deposition admitted that when he was shown the cablegram from Frey & Company offering the 1800 movements, he observed that it was addressed to Chertow, and further admitted that Chertow had told him he and Cohen "were going to split on it."

This is obviously a case in which the trier of the facts who saw the witnesses and heard the testimony is far more competent than any court of review to pass upon their credibility. From our reading of the record it appears clear to us that it was irksome to both Cohen and Markham to feel that Chertow should get 25% of the profits when he was unsuccessful in getting financing for the enterprise. It is clear, however, that Chertow's interest was not contingent. It is clear also that Chertow advanced some funds, perhaps small, but nevertheless, that would not have been done by a man who had no interest.

Appellants lay a great deal of stress on a certain affidavit which Cohen says he was induced to sign by Chertow's attorney. This affidavit in substance supported Chertow's account of the matter. At that time Cohen was evidently working together with Markham and had the same

lawyer as Markham. Cohen, desiring to pay off this lawyer and join forces with Chertow was given $640.00 by Chertow to pay the lawyer. Appellants argue that this discredits Chertow. The fact of the matter is that it discredits Cohen rather than Chertow or Chertow's lawyer because it appears from Cohen's own testimony that after he had a conversation with Chertow's attorney, he left the attorney's office and outside the presence of either Chertow or Chertow's lawyer, he himself had the statement transcribed by a stenographer and then procured a notary and swore to its contents. For him to repudiate such a statement discredits him rather than any other person. The master and the court evidently thought so and we quite agree.

One question of pleading is raised by appellants and that is that Chertow is limited in his relief by the averments of his complaint to an accounting for the profits from the sale of the first shipment of 1800 watches. We do not so construe the complaint. It alleges that Chertow negotiated with Frey & Company, who agreed to sell and export watch movements to plaintiff provided he could comply with the export requirements; that 1800 watch movements were in shipment and that Markham agreed to accept them; that Markham paid for the watches and sold a considerable number not disclosed to plaintiff. There is a demand for accounting and a prayer for general relief. We think the complaint is adequate to cover a complete accounting for all watches received from Frey & Company and sold by Markham.

The decree of the Circuit court of Cook county is affirmed.

Decree affirmed.

Friend and Scanlan, JJ., concur.

Gen. No's 10435 - 10436
CONSOLIDATED

Agenda No. 4.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

343 I.A. 289

OCTOBER TERM, A. D. 1950.

IN THE MATTER OF THE APPLICATION OF THE TOWN OF YORK, by Albert P. Lockman, Supervisor of the Town of York, and Victor P. Lantz, Clerk of the Town of York, for search warrant to obtain books, papers, documents and other property belonging to the Town of York from Arthur L. Long, former Assessor for the Town of York, Appellant, vs. ARTHUR L. LONG, Appellee.	Appeal from the Circuit Court of Du Page County.
IN THE MATTER OF W. C. JESSEN, etc., vs. ARTHUR L. LONG,	

WOLFE,-- P. J.

The Town of York by Albert P. Lockman, Supervisor of said town and Victor F. Lantz, Clerk, filed an application for a search warrant in the Circuit Court of Du Page County, against Arthur L. Long, a former assessor of said town, seeking to obtain books, papers, documents and other property belonging to the Town of York. A like petition was filed by Waldemar C. Jessen who was

Gen. No's 10|35 - 10|36
CONSOLIDATED

Agenda No. 1.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

OCTOBER TERM, A. D. 1950.

IN THE MATTER OF THE APPLICATION OF THE TOWN OF YORK, by Albert P. Lockman, Supervisor of the Town of York, and Victor F. Lantz, Clerk of the Town of York, for search warrant to obtain books, papers, documents and other property belonging to the Town of York from Arthur L. Long, former Assessor for the Town of York, Appellant,	Appeal from the Circuit Court of Du Page County.
vs.	
ARTHUR L. LONG, Appellee.	
IN THE MATTER OF W. C. JESSEN, etc.,	
vs.	
ARTHUR L. LONG,	

WOLFE,-- P. J.

The Town of York by Albert P. Lockman, Supervisor of said town and Victor F. Lantz, Clerk, filed an application for a search warrant in the Circuit Court of Du Page County, against Arthur L. Long, a former assessor of said town, seeking to obtain books, papers, documents and other property belonging to the Town of York. A like petition was filed by Waldomar C. Jessen who was

the duly elected assessor for said Town of York. This petition was amended during the time these proceedings were in Court. Arthur L. Long filed a motion to dismiss the petition. The Court proceeded to hear evidence relative to the ownership of the property sought, and dismissed the petition. An appeal has been perfected to this Court.

The Court heard evidence only in the case in which Waldemar Jessen, the assessor was the petitioner. Since the judgment of the trial court, Waldemar Jessen has died, and his wife, Bernice, was appointed assessor to succeed him, and she continues to prosecute the appeal in her own name.

The petition alleges that Arthur L. Long was the duly elected assessor for the Town of York and that Jessen succeeded him; that Jessen made a demand upon Long to turn over certain furniture and books belonging to the Town of York, which Long has failed to deliver. The main controversy in this suit is over thirty-four loose leaf and bound volumes which are claimed as records belonging to the assessor's office in said town. The evidence shows that there is quite a dispute about these records. Long and his son, a former deputy assessor, claim that these records do not belong to the assessor's office, but were private records which they had compiled during the term of Long's office as assessor. There is no dispute as to who prepared them, but there is considerable controversy on whose time they were prepared. The suit is based upon Section 462 of Chapter 38 of the Illinois Revised Statute for the year 1949, which grants the right for a Court to issue a search warrant for certain books and papers when they are withheld by a former officer who

the duly elected assessor for said Town of York. This petition was amended during the time these proceedings were in Court. Arthur L. Long filed a motion to dismiss the petition. The Court proceeded to hear evidence relative to the ownership of the property sought, and dismissed the petition. An appeal has been perfected to this Court.

The Court heard evidence only in the case in which Waldemar Jessen, the assessor was the petitioner. Since the judgment of the trial court, Waldemar Jessen has died, and his wife, Bertice, was appointed assessor to succeed him, and she continues to prosecute the appeal in her own name.

The petition alleges that Arthur L. Long was the duly elected assessor for the Town of York and that Jessen succeeded him; that Jessen made a demand upon Long to turn over certain furniture and books belonging to the Town of York, which Long has failed to deliver. The main controversy in this suit is over thirty-four loose leaf and bound volumes which are claimed as records belonging to the assessor's office in said town. The evidence shows that there is quite a dispute about these records. Long and his son, a former deputy assessor, claim that these records do not belong to the assessor's office, but were private records which they had compiled during the term of Long's office as assessor. There is no dispute as to who prepared them, but there is considerable controversy on whose time they were prepared. The suit is based upon Section 42 of Chapter 38 of the Illinois Revised Statute for the year 1947, which grants the right for a Court to issue a search warrant for certain books and papers when they are withheld by a former officer who

wilfully refuses to turn them over to his successor. This Section of the Statute designates what books and papers can be obtained in this way. The trial court held that this Statute should be strictly construed when it grants an officer the authority to forcibly enter into a home, office or other building of a person and search the same for articles that these people claim are theirs. Before a Court would be justified in issuing a search warrant to do this, the evidence must be positive and convincing and show a clear right to do so. We have read the evidence, as abstracted, and it is our conclusion that the Court properly found that the petitioners did not establish that they were entitled to the property in question, and the judgment of the trial court should be and is affirmed.

Judgment affirmed.

willfully refuses to turn them over to his successor. This section of the Statute designates what books and papers can be obtained in this way. The trial court held that this statute should be strictly construed when it grants an officer the authority to forcibly enter into a home, office or other building of a person and search the same for articles that those people claim are theirs. Before a Court would be justified in issuing a search warrant to do this, the evidence must be positive and convincing and show a clear right to do so. We have read the evidence, as abstracted, and it is our conclusion that the Court properly found that the petitioners did not establish that they were entitled to the property in question, and the judgment of the trial court should be and is affirmed.

Judgment affirmed.

In the

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

Term No. 51F18 Agenda No. 10

LOUIS E. MILLER, Plaintiff-Appellant,	)	Appeal from the
-vs-	)	Circuit Court of
NORMAN LUEHRING, Defendant-Appellee.	)	Monroe County.

Honorable Ralph L. Maxwell, Judge Presiding.

Scheineman, P.J.

The plaintiff, Louis E. Miller, was injured in an automobile accident, for which the defendant, Norman Luehring, was held liable upon a trial before the court without a jury. Plaintiff has appealed from the final judgment in the sum of $3500.00, upon the sole ground that the amount of damages thus awarded is inadequate.

The principal injuries suffered by plaintiff consisted of nine fractured ribs and a fractured scapula (shoulder blade). The rib fractures have healed with some overlapping, which is a detriment, but according to medical opinion, is not to be regarded as very serious. The shoulder injury is of greater importance. There was fragmentation of bone, and the scapula has healed in a deformed state which affects the use of the arm. The arm cannot be raised more than 100 degrees, instead of the normal 180. There is limited external rotation, and heavy labor can only be performed with pain. These conditions are described as permanent and incurable.

By reason of veteran's benefits, plaintiff's actual disbursements for medical and hospital care have been negligible. As to his employment and earnings: he resided in a village in Monroe County where he was employed as bookkeeper

and general manager of a small mill. His salary was $1800 per year plus eighty cents per hour for manual labor performed by him. In the year prior to the accident, this additional compensation amounted to $923 making total earnings of $2723 for the year.

He was away from his employment about four months. During this period, and for approximately four months thereafter he continued to receive his fixed salary, but no additional earnings. He was 58 years of age. Since about eight months after the occurance, his salary basis is $50 per week, or $2600 per year, and it is unlikely that his earnings can be augmented by manual labor. He endured considerable pain and suffering from his injuries, and will continue to suffer pain if his arm is taxed appreciably.

In summary, we would say that plaintiff is clearly entitled to damages for pain and suffering, and for permanent physical injuries. However, his actual pecuniary loss, now and in the foreseeable future, is not large, and his capacity to perform his principal functions as bookkeeper and general manager do not appear to be seriously affected.

Appellant cites several decisions from this state, involving similar, or lesser, injuries, and in which larger verdicts were held not excessive. Such decisions may be of interest, but they can hardly be taken as guides. The pecuniary effect of a given injury will vary greatly under varying conditions, such as the nature of the party's occupation and employment, his fixed residence in centers of concentrated population or otherwise, and other intangible factors.

It is obvious that certain of the results of personal injury are insusceptible of admeasurement, from which it follows that in this class of cases, the amount of the award rests largely within the discretion of the jury. 25 C.J.S. Damages, Sec. 81. Hence, the fact that one verdict is held not excessive, does not mean that a criterion has been

established, so that another verdict materially less in amount, is necessarily inadequate, even though the injuries are similar.

The general rule is that a judgment will not be disturbed on appeal for mere inadequacy of damages awarded, unless it appears that the verdict may have been the result of passion or prejudice in the jury, or of errors of law by the court. Abt. vs. Chicago Rys Co., 207 Ill. App. 314; Kleiman vs. C. & N.W. Ry., 205 Ill. App. 343; Hosie vs. LaSalle, 204 Ill. App. 481. In the absence of such limiting conditions, the assessment of damages rests in the sound discretion of the jury. Maskaliunas vs. C. & W.I. Ry. 235 Ill. App. 198, affirmed 318 Ill. 142. Of course, this discretion also rests in the trial judge where the case is tried without a jury.

We perceive no possible basis for this court to assert that the trial court's finding was the result of passion or prejudice. On the contrary, we regard the result as clearly within the scope of the testimony as we view it. Moreover, the trier of facts has the added advantage of direct observation of the plaintiff, as well as of the expert witnesses, and thus is in much better position than this court to evaluate the testimony.

The judgment of the circuit court is affirmed.

Judgment affirmed.

Culbertson, J. and Bardens, J. concur.

(Publish Abstract Only)

In the

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

Term No. 51F14 Agenda No. 11

CLIFFORD C. KANE, Plaintiff-Appellee, -vs- SAM PEAR, Administrator of the Estate of John R. Pear, Deceased, Defendant-Appellant.	)	Appeal from the Circuit Court of St. Clair County.

Honorable Edward F. Bareis, Trial Judge

Scheineman, P.J.

The appellee, Dr. Clifford C. Kane, filed a claim for his personal services as a physician against the estate of John R. Pear, deceased. From the final disposition of the claim in probate court, an appeal was taken to the Circuit Court of St. Clair County. After a trial de novo before that court without a jury, final judgment was entered in favor of the claimant, for the full amount of the claim, in the sum of $320.00. This appeal was then perfected.

As grounds for reversal, appellant's argument presents three points: (1) That claimant produced no evidence that the claim, even if just, was unpaid. (2) That the court erred in admitting as evidence a certain card, identified as Claimant's Exhibit #1, purporting to be a statement of account between claimant and the deceased. (3) That there is no competent evidence to establish the claim, if said exhibit is excluded.

The first point cannot be sustained, for the reason that payment is an affirmative defense as to which the defendant had the burden of going forward with evidence. No evidence of payment was offered by the estate. Therefore, plaintiff

had no obligation to prove the negative.

As to claimant's Exhibit #1, a witness was produced who testified that she was employed by the claimant, a physician, and kept his books and records; that Exhibit #1 was the card for the patient, John R. Pear, of the house calls and hospital calls made by Doctor Kane to see this patient. Thereafter, without further testimony thereon, the card was admitted in evidence, over specific objections pertaining to the lack of adequate foundation.

Under the provisions of Section 3, Chp. 51, Ill. Rev. St., 1949, books of account or other records are admissible in evidence after certain preliminary testimony. No attempt whatever was made to meet the preliminary requirements. There was no evidence that the card consisted of contemporaneous original entries, who made them, or that they were true and just; nor was there anything to show that the entries were made by an employee in the usual course of business or trade. For aught that appears in the transcript, the card might be a mere self serving statement prepared by claimant at the time he filed the claim. In view of the total absence of any proper foundation, it was error to admit this exhibit in evidence.

The verified claim filed in probate, as certified by the Clerk of the Probate Court, consists of items for house calls aggregating $15.00; items for hospital calls in 1946 at $5.00 per day aggregating $235.00; and items for hospital calls in 1948 aggregating $70.00. As to the house calls and the 1948 hospital calls, there was no evidence except the card exhibit, which we have held should have been excluded.

There was some additional evidence as to hospital calls in 1946 at two separate hospitals. From one, an attendant testified she remembered John R. Pear being a patient, with

the claimant as his attending physician. She had no independent recollection of the precise dates Pear was in the hospital, but was able to refresh her recollection by reference to a record put together daily by herself at the time. From the other hospital, the superintendant testified by reference to hospital records as to dates that Pear was in the hospital, and that claimant was the attending physician.

From the foregoing, it is apparent that John R. Pear was hospitalized during the dates in 1946 for which the claim is asserted. It is also shown that claimant was the attending physician. Other testimony was presented as to the reasonableness of charges, based on the assumption that the claimant visited his patient every day the latter was hospitalized. Unfortunately, no witness testified to any such fact, if it was a fact.

It may be that the hospital records themselves would show daily calls by the attending physician, but we are not informed as to that. The records were produced in court, but no attempt was made to qualify them as evidence, and they were not offered as exhibits. Testimony by the witnesses, after referring to the records, indicated that the patient was hospitalized for a continuous period of 46 consecutive days. But we are obliged to sustain the contention of appellant, that this fact, by itself, does not establish that the patient's physician called every one of those days. It follows that the claim has not been established by competent evidence.

Since the errors above noted may be obviated upon a retrial, our proper course is to remand for a new trial, rather than enter judgment here. Frey v. City of Chicago, 330 Ill. 640.

Accordingly, the judgment is reversed and the cause is remanded with directions to grant the claimant a new trial.

Reversed and Remanded.

(Publish abstract only)

Culbertson, J. and Bardens, J. concur.

462

A

45308

WALTER B. HOUGH, Appellant,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
VIVIAN VERNON PARKER, Appellee.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On November 13, 1944 plaintiff had judgment by confession against defendant on a promissory note which, together with interest and attorneys' fees, aggregated $1526.20, plus costs. Thereafter, on December 9, 1947, defendant filed a verified petition to vacate the judgment wherein she alleged that it was based on a note dated January 31, 1935 in the sum of $1000.00, secured by a trust deed covering property at 4838 Prairie avenue, Chicago; that prior thereto the property had been encumbered by a first and second mortgage; that the second mortgage was held by plaintiff; that about January 22, 1935 plaintiff agreed to accept HOLC bonds in the sum of $480.84 in full settlement of his second mortgage, and surrendered the note and trust deed covering the indebtedness to the HOLC; that defendant was then advised that she should sign a note for $1000.00 which she did; and that said note was without consideration in that plaintiff had accepted HOLC bonds in full payment of his indebtedness. The court vacated the judgment and gave plaintiff leave to file an answer to the petition within ten days, and thereafter, issue being joined, the cause was set for trial on the

merits. Pursuant to hearing the court found the issues against plaintiff and entered judgment for defendant, from which plaintiff has taken this appeal.

The essential facts disclose that in May 1930 Ishmel Parker, owner of the real estate at 4838 South Prairie avenue, Chicago, conveyed the same by deed in trust to the Stock Yards Trust and Savings Bank which later became the Live Stock National Bank. Plaintiff was one of the beneficiaries of that trust. At the time of the conveyance the real estate was subject to a first trust deed securing three notes aggregating $4500.00 held by one Dickerman. Subsequently, in August 1932, Parker and his then wife Catherine executed a second or junior trust deed purporting to convey the real estate to plaintiff as security for twenty-four notes aggregating $2000.00. With the real estate thus encumbered Parker early in 1934 applied to HOLC for a refinancing loan. However, during that year, before the loan was consummated, Parker died. At the time of his death he was in possession of the real estate, and thereafter his estate was probated in Cook County. At the time of his death Parker was married (his second marriage) to defendant Vivian Vernon Parker. To consummate the HOLC transaction which her husband had initiated, and also to handle his estate and affairs, she retained Bindley Cyrus, an attorney; for this service--out of the proceeds of the loan--Cyrus was to receive a fee of $500.00; however, because of the relatively

heavy demands against the small estate he subsequently reduced his fee to $150.00. He undertook to induce Dickerman to consent to a reduction of the $4500.00 amount due him in order to conclude the HOLC loan, but was unable to persuade him to accept less, and after deduction of title and other expenses there remained only about $500.00. Cyrus was not advised of plaintiff's present contention that Parker owed monies other than the sum represented by the second mortgage, and accordingly confined himself to working out an arrangement with plaintiff whereby, in place of the $1500 which he had originally demanded, he agreed to accept a $1000.00 note from defendant secured by a second mortgage on the real estate, to be made after the HOLC matter was concluded. Thereupon, on January 5, 1935, plaintiff directed the Live Stock National Bank to convey the property to defendant, and on January 7, 1935 signed and delivered his consent as mortgagee to accept $495.50 in bonds and cash not exceeding $25.00 in full settlement of his second mortgage indebtedness. Shortly thereafter, on January 12, 1935, he executed his authorization for the delivery of his bonds, and on January 17, 1935 wrote to Cyrus enclosing the note and trust deed for $1000 to be signed by defendant, with the request that it be executed after the HOLC loan had been completed. The note was dated January 31, 1935, and the trust deed was recorded August 12, 1937.

Upon hearing of the cause defendant interposed the defense that the note for $1000.00 and the trust deed

securing it contravene the policy and intent of the Home Owners' Loan Act of 1933, and violate the express agreement of plaintiff to accept $495.00 in bonds and cash in full settlement of his claim. Title 12 of the Home Owners' Loan Act (12 U.S.C.A., sec. 1463(k)) authorized the board to make and put in operation all necessary rules; one of the rules so adopted (sec. 4-d(1) of ch. VI of the Manual of Rules and Regulations of the Home Owners' Loan Corporation effective October 10, 1934) provided in substance that the corporation would not refund any indebtedness where the mortgagor was required to pay any assumed loss of the mortgagee. Defendant contends, and the evidence supports the conclusion, that the note here in question and the trust deed securing it were taken by plaintiff for the purpose of circumventing the Home Owners' Loan Act and obtaining for him a greater amount than he was legally entitled to receive in settlement of his second mortgage claim. The precise question arose in Bealkowski v. Powers, 310 Ill. App. 662, wherein the lienholder signed a form entitled "Mortgagee's Consent to Take Bonds" which contained substantially the same language as the consent signed by plaintiff in the case at bar which is as follows:

"To Home Owners' Loan Corporation.

"The undersigned is a holder of a first mortgage or other obligation which constitutes a lien or claim on the title to the home property of Vivian Vernon Parker, located at 4838 Prairie Avenue, Chicago., Ill., in the

sum of 2,200.00 including unpaid balance of principal and interest to date.

"Being informed that said owner has made application to Home Owners' Loan Corporation to refund his said indebtedness, the undersigned has considered the method of refunding mortgages provided in Home Owners' Loan Act of 1933 as amended and passed by Congress and approved by the President, and the undersigned hereby consents, if said refunding can be consummated, to accept in full settlement of the claim of the undersigned the sum of 495.50 face value of the bonds of Home Owners' Loan Corporation, to be adjusted with not exceeding $25.00 cash and thereupon to release all of the claim of the undersigned against said property."

In the Bealkowski case the court observed that by enactment of the Home Owners' Loan Act the Federal Government adopted the policy of aiding distressed home owners; that no one else was eligible for its benefits; and that any benefit to creditors was merely incidental, and quoting from McAllister v. Drapeau, 95 Cal. App. 604, said that "'if a creditor could lawfully exact a secret second lien from his debtor, in many cases that would confer the benefits of the act on the creditor rather than the debtor,'" and, continuing to quote with approval, "'Thus, in every case where the terms of the secret second lien were such that the debtor was financially unable to pay off both the first and second, the holder of the second, upon default by

the debtor, could foreclose his second lien . . . and obtain the property subject to the mortgage of the HOLC . . . a very favorable type of mortgage which at that time was not generally available. In this way the creditor could and would circumvent the policy of the act and would obtain benefits never intended for him.'" We think the Bealkowski case is well reasoned and decisive of the controversy here presented. The testimony in the case at bar sustains the contention made by defendant that throughout negotiations between plaintiff and Cyrus no mention was made by plaintiff of any other claims that he had. Cyrus so testified, and although plaintiff was recalled in rebuttal he did not attempt to deny Cyrus' testimony. It is strange that plaintiff, at the time Parker's estate was being settled in 1934-1935, advanced no claim with respect to his presently alleged non-mortgage loan, and did not file court proceedings until almost ten years thereafter. It is also significant that the note in question was not taken by plaintiff with the consent or approval, or even with the knowledge, of the Home Owners' Loan Corporation.

Cases relied upon by plaintiff can readily be distinguished. The facts in Chicago Title & Trust Co. v. Szymanski, 289 Ill. App. 600, are not at all similar. In Huff v. Fulk, 334 Ill. App. 33, the mortgagee did not sign a consent to accept the bonds, as did plaintiff in the case at bar. Plaintiff here received and accepted the benefits of the refinancing, and should not be permitted to circumvent the

purpose of the act to obtain benefits for himself which were never intended by that statute and rules promulgated thereunder.

Accordingly we think the Municipal Court properly vacated the judgment by confession and entered judgment for defendant. Judgment of the trial court is therefore affirmed.

Judgment affirmed.

Schwartz, P. J., and Scanlan, J., concur

463 A

45179

NUSHON ABRAHAMIAN, Appellee,	)	APPEAL FROM CIRCUIT
v.	)	COURT OF COOK COUNTY.
NICKEL PLATE RAILROAD CO., Appellant.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A suit under the Federal Employers' Liability Act to recover for personal injuries sustained by plaintiff in an accident. A jury returned a verdict for plaintiff and awarded him $20,000; defendant's motion for a new trial was denied, and judgment was entered upon the verdict. Defendant appeals.

No point is raised as to the pleadings. Defendant abandons in this court its defense of nonliability. It raises no questions respecting the admission or refusal of evidence nor the propriety of arguments, but contends that "the trial court erred: (1) in refusing to grant a new trial because of the excessiveness of the verdict; and (2) in refusing to give defendant's tendered instructions Nos. 16, 19, 20 and 22." Defendant states that "this appeal was taken because it is our firm conviction that the evidence clearly establishes that the $20,000 awarded by the jury is manifestly beyond the bounds of reason."

Plaintiff, approximately fifty-five years of age, is married and has three children. He came to this country when he was seventeen or eighteen years of age and has always worked at hard labor that required him to stand

on his feet. In May, 1945, he was employed by defendant as a freight handler, in East St. Louis, Illinois. He worked six, and sometimes seven days a week. His work required him to lift heavy objects and to stand on his feet most of the day. Defendant's general agent in charge of the freight house testified that plaintiff was a "good hard worker. He worked conscientiously for about three years"; that he "worked every day when there was work to be performed." Plaintiff is uneducated and is not qualified to fill any occupation save that of a laborer. Defendant concedes that "plaintiff is unlettered and was a good worker." At the time of the accident, together with two other employees of defendant, plaintiff was standing on a metal plate or skid which bridged the distance between the back of a trailer and the floor of the freight house, and the skid, or bridge, which had not been fastened in the usual manner, suddenly slipped, while defendant and the two other employees were pushing a hand truck onto the trailer. Plaintiff fell down into the space between the freight house platform and the truck trailer and his left foot was injured when the metal bridge, made of steel and weighing about 175 or 200 pounds, fell against it. Plaintiff testified that he felt "very bad pain" after the accident; that at first he was able to put his foot down but when he got to Dr. Ryan's office the foot gave him more pain; that Dr. Ryan was a defendant company doctor; that the day after the accident two men carried plaintiff to the defendant company hospital; that he

could not step on his left foot at that time; that it was swollen and had changed color; that Dr. Ryan gave plaintiff heat and light treatments for several months; that at the end of that period the left foot pained him severely when he walked, and Dr. Ryan sent him to Cleveland to see Dr. Duncan, also a defendant company doctor. Plaintiff testified that at one time he used crutches, but discarded them; that he then walked with the aid of a cane; that his left foot continues to pain him; that if he walks without the aid of a cane he has to "walk cripple", and if he walks any distance he has to walk very slowly; that if he "walks cripple" he does not feel much pain, but if he tries to "walk straight" his left foot gives him pain. Plaintiff testified that he had not been to any doctor for treatment since September, 1948. Dr. Duncan, testifying for defendant, stated that when he examined plaintiff, on November 26, 1948, he found a moderate thickening over the top of the left foot, the mid-portion of it, and the tarsal portion of it; that he found good pulsation in the artery at the top of the foot and less in the arteries in the back of the ankle; that nonuse of any part of a person's anatomy produces wasting of the muscles and that it also produces a change in the bones of the part, where the calcium is washed out, leaving a more porous appearance of the bone in an X-ray picture; that he read X-ray pictures in connection with his examination of plaintiff; that "on the basis of my examination" of plaintiff "I was able to form an opinion based on a reasonable degree of medical certainty

as to the permanency of the conditions which I found existing there"; that "my opinion was, in the light of my experience with difficulties such as this, that his outlook was good as far as recovery was concerned." Upon cross-examination the witness stated that he "found that there was a thickening in the tarsal area of the foot"; that "I made a diagnosis of that. The diagnosis was that the man had an injury to the soft tissues of the tarsal of his foot. This soft tissue injury, if the bones were not affected, could result in a bump or swelling or thickening four or five months after the accident occurred. I don't think that is a permanent condition." The following then occurred: "Q. Assuming that an examination of this man on December 14th of 1949, approximately a year and a half after the accident, revealed the presence of that same thickening that you described, would you have an opinion as to whether that condition was permanent or not? * * * A. I think if those are the facts, that there will be some permanent thickening. Q. So the outlook under those circumstances might not be so good, is that correct? A. If those are the facts, that is true." The witness further testified that one of defendant's X-ray pictures showed "an overlapping of the middle and lateral cuneiform bones in that view"; that he had seen quite a number of patients for the Nickel Plate road and that "I testify for them on the basis of a fee." The doctor later testified that upon examination of Exhibit 3 he was of the opinion that it did not show a fracture; that "a fracture may show up later on

by an increase in density. That is after it is filled in"; that his diagnosis is "that this man has bone atrophy following injury."

Plaintiff called but one expert as a witness, Dr. Donald S. Miller, head of the Department of Orthopedics of the Chicago Medical School and Chairman and head of the department of Cook County Hospital, orthopedic section, and Professor of orthopedic surgery at the Cook County Graduate School, who made three separate physical examinations of plaintiff and on each occasion had X-rays taken. This doctor testified that he first examined plaintiff on September 23, 1948, and that he found that "the left foot was thicker in circumference by actual measurement as compared to that of the other foot which I considered normal. The left calf was an inch and a quarter thinner than that of the opposite calf of the right foot and the area between the heel and the top of the foot, which we call the dorsum of the foot, showed a thickening of a half of an inch. The dorsom is the top of the foot. He had a restriction of motion. I could tell that objectively by feeling a bone and block all resistance to motion. The motions were restricted in a mild manner; in other words, it was not a serious restriction, but there was a mild restriction of the first degree, but we consider that a complete restriction is four degrees, this is the first degree in both dorsal flexion and plantar flexion, that is bringing the foot down and up and in and out. The color of the foot was different than that of the opposite foot. We call it cyanosis. It

was a little blue. Both pulses were present, however. And the two major blood vessels felt normally. And the restriction was also - we call it the metatarsal - phalangeal joints." Concerning his X-ray examinations Dr. Miller stated:

"This to your left is the right foot, showing the tarsal bones and the metatarsal bones and to your right, that is the left foot as indicated by '1,' to your left there is a normal foot with normal joint set lines and normal architecture. And to your right, or the left foot, we have atrophy of bone or a waste of bone as compared to that of the left.

"That is indicated in the X-rays because it doesn't have the bone density. It is thinner on the right as compared to that of the nice, clear cut line; here you have an overlapping line. We call it that the joint lines are irregular and not detailed. On the pathology that I see in the left foot is a compression of the fifth metatarsal. These are the metatarsals (indicating). The fifth metatarsal, and an irregularity of the first and second cuneiforms. They are clear. These appear compressed and atrophic - or atrophy of the bone. I would say this is a compressed fracture of the fifth metatarsal bone and marked atrophy with compression of the first and second cuneiform bone. The picture to the right is marked atrophy, bone wasting, as looked at the whole, but the left foot here, compared to the one on the opposite side, has a washed out appearance. The significance of that is one of two things - bone wasting with destruction of the joint or compression of

the first and second cuneiform. By compression I mean the bone was squeezed. And the same thing with the fifth metatarsal.

"* * * the fifth metatarsal bone has a little niche, as though something has been eaten out and this, therefore, is a compression fracture of the fifth metatarsal bone.

"Exhibit 4 was taken May 16, 1949. I made my second examination of the plaintiff on that date.

"On plaintiff's Exhibit 4 is the metatarsal bone and the atrophy is not as pronounced in this picture as in the one in the past. This is the right foot and there again we see normal joint lines, perfectly normal looking foot. And the opposite foot, the left foot shows that same bone atrophy or thinning - * * * I might say that the peculiar compression of the fifth metatarsal seems to be filling out in this picture."

Dr. Miller testified that he next examined plaintiff on May 16, 1949, almost a year after the accident; that upon that examination he found objectively a swelling of the dorsum of the foot, or the top of the foot; that there was not quite as much thinning of the left calf by actual measurement; that "the swelling of the dorsum of the foot or the top of the foot was still there and the restriction of motion was still there both in the ankle joint and the joints that I have mentioned before, the metatarsal-phalangeal joints." Dr. Miller again examined plaintiff on December 14, 1949, and again made measurements. He stated that "there was still a discrepancy in the measure-

ments of the foot. We call it the metatarsal area right in the center of the foot. It was thicker on the left side than that of the opposite normal side. The calf was still a little thinner than the opposite one and the restriction of motion was still there. Both pulses were present, however, and the circulation of the major vessels was normal, but the foot was still blue." Dr. Miller stated as his opinion that the condition of plaintiff as he found it upon the last examination was permanent; that "the basis of my opinion is that for more than a year and a half the dorsum of the foot still maintained the same amount of thickening. There was no appreciable change in X-rays on two or three serial pictures, and that the atrophy of the calf and restriction of motion, although somewhat improved, still was present." He further testified that the effect of plaintiff's injury upon his ability to work as a laborer was that "this foot cannot take the usual stresses and strains in labor type of work." Upon cross-examination the witness stated that one cause of atrophy is nonuse.

The defense called seven witnesses as experts. Of these Dr. Francis Bihss, Dr. Merthyn Thomas and Dr. Nathan S. Zeitlin were roentgenologists. None made a physical examination of plaintiff, and testified as to their interpretation of certain X-ray pictures taken of plaintiff. Dr. Bihss did X-ray work for defendant on "requisitions." He testified that he examined defendant's Exhibit 2, an X-ray picture, and found "no demonstrable evidence of any fracture lines, of any fractures. Direct-

ing my attention to the fifth metatarsal bone, there is no evidence of compression fracture"; that the "change in the density of the bone which I have referred to is consistent with non-use of the foot." Upon cross-examination he testified that he examined plaintiff's Exhibit 3 and failed to find a fracture therein, that "that is an overlapping of the proximal portion of the fourth metatarsal bone of this one. I see very definitely in this picture an increase in porosity of the bone as compared with the right foot. It is considerably darker in aspect than that of the other foot"; that in examining plaintiff's Exhibit 5 "I see an increase in the porous condition of the bone in the left foot as compared with the right. It is progressively more porous than the one that you saw previously." The witness testified that when he had X-ray plates made by others he saw plaintiff but did not look at his foot. Dr. Thomas made X-ray plates on November 26, 1948, at the instance of Dr. Duncan. Dr. Thomas stated that he examined defendant's Exhibit No. 3 and plaintiff's Exhibit No. 2 and that he found no evidence of a fracture or dislocation in either picture, that he found a "diminished amount of lime salts in the left foot." Dr. Zeitlin testified that he was a specialist in X-ray diagnosis and that he interpreted over 200 films a day; that he had examined defendant's Exhibit 3, an X-ray picture of plaintiff's left foot, on September 7, 1948, and that that exhibit shows no evidence of any fracture or dislocation, or abnormality of the bone structure; that there is a little bit of arthritis

in the big toe, some calcified deposits in the joint of the big toe; that there was also some decalcification of the bone structure of the left foot, but that he attributed this to disuse. On cross-examination the doctor testified that in his judgment trauma does not aggravate arthritis; that it might light up some symptoms for a week or two and then subside. Dr. Kilian Fritsch, who resides in East St. Louis, Illinois, testified that he saw plaintiff in September, 1948; that he was referred to him for the purpose of examination and treatment of a foot complaint; that he found that plaintiff had a torsal strain and a metatarsal strain; that both feet were giving plaintiff trouble at the time, one foot more than the other; that he prescribed for plaintiff a pair of arch supports and contrast soaks, that is, soaks in hot and cold water, to improve the nutrition and circulation of the foot so as to hasten recovery; that plaintiff complained of pain in his left foot; that upon examination of that foot he found that it showed some tenderness and some signs of torsal strain as well; that he saw plaintiff again about September 21 and then observed that he had poor circulation in both feet and he felt that some of plaintiff's trouble was caused by poor circulation in both feet; that on the basis of his examination and treatment of plaintiff he made a diagnosis of plaintiff's condition; that the diagnosis was foot strain, aggravated by trauma; that plaintiff did have a trauma and "I think that that did aggravate a pre-existing foot strain he had in both feet"; that plain-

tiff said he had a trauma and "I believe he had an aggravation of a pre-existing foot strain condition which he had in both feet"; that there was no evidence of any fracture in the films that were made at St. Mary's or the films that were made at Dr. Bell's office; that "it was all soft tissue injury"; that on examining defendant's Exhibit 2 he found no evidence of any fracture present; that he saw no evidence of any fracture of the cuneiform bones or of the fifth metatarsal bones; that in examining one of the X-rays the only thing that he observed was an osteoperosis, which is the medical term for loss of lime salts in the bone, due to disuse. The doctor testified that he was served with a subpoena at his office in East St. Louis and was told that he would be paid for his loss of time and expenses. On cross-examination the doctor testified that plaintiff complained of pain in his left foot and told the doctor that when he walked any distance on the left foot it pained him considerably; that he diagnosed his condition as a tarsal strain of the left foot aggravated by trauma; that the tarsal strain could be caused by the accident; that he considered the favoring of the left leg in walking to be the result of a disuse of the leg; that as he did not put as much weight on that leg as he does on the other one it would result in osteoperosis of the bone or loss of lime salts; that at the time of his examination he dictated to the girl in his office that he found "some swelling of the dorsum part of the foot." The doctor further testified that he came to Chicago on the same

train as Dr. Ryan and that he discussed plaintiff's injury with Dr. Ryan. Defendant also offered a report of Dr. Arthur H. Conley, of Chicago, dated May 20, 1949. The report reads as follows:

"'I examined this fifty-five year old Armenian trucker on 5-17-49' -

"Mr. Finn [attorney for plaintiff]: Fifty-four.

"Mr. McKay [counsel for defendant]: Fifty-four, I am sorry.

"'He is of Armenian parentage but was born in Turkey. You, no doubt, are familiar with the history and sequence of events in this case.

"'He stated that he was injured 6-28-48, when his left foot was crushed very bad. He has not worked since.

"'Present complaint was "I have small pain. I feel it now. I hurts when I step with the shoes. When I walk and my toes bend it hurts, bad pain."

"'Past history: Essentially negative aside from old injury to the left index finger while employed by the Sterling Company before being employed by the Nickel Plate Railroad in East St. Louis.

"'Examination: This man states that he thinks he is about fifty-four years of age but he is not sure. The general physical examination, so far as the systemic diseases that might be a contributing factor or any abnormal condition that might be due to trauma other than stated below, are absent.

"'The left foot: Is not edematous; <u>there is some</u>

very moderate amount of thickening of the dorsum of the foot in the vicinity of the tarsal, metatarsal joints of the third, fourth and fifth toes. He does not complain of any particular tenderness on palpation at any place in the foot. He has a good dorsalpedis artery. He has a good range of motion in his ankle joint, he has a good range of motion in the tarsal joints. There is no contracture of the toes or the plantar fascia. The foot did not perspire abnormally. The color was exactly the same as the other foot. There was no abnormal temperature change as compared with the opposite side. He did complain, however, when he passively extended his toes actively but states that this is what causes pain when he walks. He uses a cane, and on questioning, states he has used it since last winter. Following the accident he was on crutches for one to two weeks but did not use a cane at any time until as indicated above.

"'X-ray examination: Multiple views of both legs, taken on 14 by 17 films for evidence of calcification in the blood vessels, did not evidence any abnormal calcification for his age; more multiple views of the left ankle region, that is an a.p., lateral, oblique, compared with an a.p. lateral, and oblique on the right side, showing the distal one-third of the tibia and fibula, the ankle mortise, the calcaneus, the astragalus, the cuboid and scaphoid bones. There is practically no difference in their appearance. There definitely is no evidence of Sudeck's Atrophy. In the soft tissue studies of both

feet for calcification in the blood vessels, I see none. I do not see any pathology in the metatarsal-phalangeal joint that could account for the slight thickening on the dorsum of his left foot. From an X-ray standpoint there is little if any difference in the comparison of these two areas.

"'Conclusion: It is my opinion that this man had a contusion by crushing in the vicinity of his first metatarsal. He also had some soft tissue injury. The injury resulted in a minimal disability. I find no clinical or X-ray evidence to account for his prolonged disability at this time.'"

Dr. Lawrence A. Ryan, a witness for defendant, testified that he lived at East St. Louis, Illinois, and that he is the local surgeon for defendant Railroad and takes care of men who are injured; that he saw plaintiff on June 28, 1948, and found that he had an injury to his left foot; that he had a moderately severe contusion of the left foot, a slight swelling on the first visit, more the following few days; that he had no abrasions, cuts or lacerations; that he sent plaintiff to St. Mary's hospital to have X-rays taken; that he saw plaintiff every day for about a week and then saw him every two days; that during the month of July he saw him at intervals of three, four or five days, "and the same in August"; that the last time he saw plaintiff was on September 8; that the treatment he gave plaintiff was antiseptics with light pressure bandages, and infra-red light was also used on his foot; that he

diagnosed plaintiff's trouble as "a contusion, rather a decontusion of the left foot"; that he thought at the time that in three or four weeks the disability would probably be all right. On cross-examination he testified that for several days after he first saw plaintiff the swelling got worse; that plaintiff complained of pain in his left foot when he would walk a distance of two or three blocks; that he never saw plaintiff after September; that plaintiff was then still complaining of pain in his foot when he walked a distance, and that they sent him to Cleveland for examination by Dr. Duncan "at my request, because I could not see enough to judge. I thought the injury should be better than it was, and I just suggested that they might have him in Cleveland"; that he thought plaintiff's condition had cleared up objectively but that plaintiff was complaining of pain in his left foot and "I take what the patient tells me."

Defendant states in its brief: "While the evidence unquestionably establishes that plaintiff has a thickening on the top of his foot and that there is a likelihood of permanency, the fact remains that there is not a scintilla of evidence in the record by Dr. Miller, or anyone else, that this thickening is any way disabling, or that there is any causal relation between it and plaintiff's claimed pain in his foot when he walks." Defendant further states that during the time that plaintiff was under the care of Dr. Ryan "plaintiff concededly did not have normal use of his left foot."

Defendant insists "that the fracture testimony of plaintiff's lone expert, Dr. Miller," was destroyed by the testimony of defendant's seven experts that there were no fractures of any of the bones of plaintiff's left foot, and it contends that defendant's evidence "clearly establishes that he suffered only some soft tissue injuries to his foot and that the disability resulting therefrom had virtually, if not entirely, ceased by the time of trial." We disagree with this contention of defendant and we think that certain testimony given by several of defendant's experts tends strongly to rebut the contention. Nor can we agree with defendant's argument that the testimony of defendant's seven experts necessarily destroyed the testimony of the one expert testifying for plaintiff. In the instant case defendant had an army of company doctors that it could call as expert witnesses. Experts cost money and it is unreasonable for defendant to argue that plaintiff had an equal opportunity to produce experts. The jury, in our judgment, were fully justified in finding that plaintiff was not a malingerer and that he was an honest witness. The instant contention does not accord with the admission made by defendant's counsel upon the oral argument that an award of $4,000 or $5,000 would compensate plaintiff for the injuries he sustained in the accident. While defendant contends that the verdict is the result of passion and prejudice, it saw fit to conclude its brief with the following words: "* * * if the Court should be of the opinion that a new trial is not warranted, affirmance

should be conditioned upon the filing by plaintiff of a substantial remittitur." Defendant calls attention to the fact that plaintiff did not file his suit in East St. Louis, where the accident occurred, but brought it in Chicago, and infers that plaintiff's motive in doing so was that he hoped to obtain a larger verdict here than he would obtain in East St. Louis. This statement tends to explain the strong feeling displayed by defendant in fighting the damages in the instant case. That railroads are bitterly opposed to plaintiffs' commencing proceedings against them in places far removed from the places of the accidents, see Atchison, T. & S. F. Ry. Co. v. Andrews, 338 Ill. App. 552. We are satisfied that even if it be assumed that the weight of the evidence shows that plaintiff suffered no fractures in his left foot, nevertheless, the jury were justified in finding that he sustained serious injuries as the result of the accident. We have concluded, however, that at the time of the trial there had been an improvement in his condition and that a greater improvement had been retarded by the fact that plaintiff did not use his left foot. We are mindful of the fact that plaintiff testified that when he used his left foot normally he suffered pain. The argument that the verdict of the jury was the result of passion and prejudice is an idle one. We would not arbitrarily substitute our judgment for the judgment of the jury as to the amount of the damages, but we have reached the conclusion, after a serious consideration of all of the evidence bearing upon the alleged

injuries of plaintiff, that justice would be best served if plaintiff remitted $6,000 from the amount of the judgment.

Defendant contends that the court erred in refusing to give to the jury defendant's instruction No. 22. The instruction reads as follows:

"The jury are instructed that the burden of proving the amount of damages that plaintiff may recover is upon the plaintiff and he must establish the amount of damages by a preponderance, or greater weight of the evidence, and with respect to future damages he must establish the same by a preponderance or greater weight of the evidence to a reasonable certainty."

The foregoing instruction is subject to a number of just criticisms. The question as to the quantum of proof required of a plaintiff in a civil case is settled in this State.

"In Teter v. Spooner, 305 Ill. 198, the Supreme court stated (p. 210): "In civil cases the burden of proof which rests upon the party holding the affirmative of the issue is to prove the issue by a preponderance of the evidence, and it is error to give an instruction to the jury which imposes a greater burden, such as to convince the jury, or to satisfy the jury, or prove to the satisfaction of the jury. All that is required of the party having the burden of proof is to prove the issue by a preponderance of the evidence."

Damages are an essential part of plaintiff's case.

In Prudential Ins. Co. v. Spain, 339 Ill. App. 476,

the court states (p. 482): "It is not necessary in a civil action to prove any fact, except by a preponderance of the evidence (Mitchell v. Hindman, 150 Ill. 538). The statutes under consideration in no way change the rules of evidence. Our courts have said that a requirement of proof that 'satisfies' is too exacting as it may be taken to mean proof beyond a reasonable doubt, and requires more than a preponderance (Sonneman v. Mertz, 221 Ill. 362.)"

Defendant cites in support of the instruction Lauth v. Chicago Union Traction Co., 244 Ill. 244, 251. There the Supreme court was not passing upon an instruction but was passing upon the admissibility of certain evidence. The defendant extracted certain language in the court's argument and tenders that language in instruction No. 22.

In Norkevich v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 1, in passing upon an instruction we stated (p. 16):

"The defendant concedes that the instruction is an excerpt from the opinion of the court in Looney v. Metropolitan R. Co., 200 U.S. 480. Our Supreme Court, on a number of occasions, has commented upon the practice of converting sentences in the opinion of the court into instructions, and has held that it is a bad practice and one that often leads into serious error."

Instruction No. 22 states that plaintiff "must establish the amount of damages by a preponderance, or greater weight of the evidence." From this language a jury might infer that plaintiff had to produce a witness to testify as to the amount of damages. It is the settled rule in

this State that it is not necessary that any witness should have expressed an opinion as to the amount of damages but the jury may themselves make such estimate from the facts and circumstances in proof, relating to the subject of the extent of the plaintiff's damages. (See Thompson v. Northern Hotel Co., 256 Ill. 77, 86, 87.) The instruction also calls upon plaintiff to establish the amount of damages and with respect to future damages to establish the same by a preponderance or greater weight of the evidence to a "reasonable certainty." It has frequently been held that it is erroneous to require the plaintiff to "establish" anything. (See Hurzon v. Schmitz, 262 Ill. App. 337, 339.) But the greatest vice in the instruction is that it requires plaintiff to establish future damages by a preponderance or greater weight of the evidence to a "reasonable certainty." In support of the instruction defendant also cites Shelton v. Thomson, 148 F. 2d 1, and contends that that case holds that it was reversible error to refuse an instruction embodying the rule as to future damages set forth in defendant's refused instruction No. 22. We note that the instruction in the Shelton case did not use the word "establish." The Circuit Court of Appeals in that case did not approve the instruction before it. It held that it was "clumsily and inartistically drawn" but did hold, apparently, that the instruction was sufficient to focus the trial court's attention to the issue of permanency and that the trial court should have given an instruction on that subject. Such a practice does not prevail in this State, nor does it seem

to prevail generally in the Federal courts. (See Baltimore & O. R. Co. v. Felgenhauer, 168 F. 2d 12; Omaha Packing Co. v. Pittsburgh, 120 F. 2d 594, certiorari denied 314 U. S. 645; and Stewart v. Capital Transit Co., 108 F. 2d 1, certiorari denied 309 U. S. 657.) It was held in Howard v. Capital Transit Co., 163 F. 2d 910, that it was no part of the duty of the trial court to rewrite erroneous instructions. See, also, People v. Andrews, 327 Ill. 162, 177. Other Illinois cases to the same effect might be cited, if it were necessary. If the trial court had given instruction No. 22 and there was a verdict for defendant, the giving of that instruction would constitute reversible error.

Defendant contends that the court erred in refusing instruction No. 20, tendered by it. The instruction reads as follows:

"You are instructed that no allowance is to be made by you for future or prospective damages, such as damages which might arise from pain, discomfort or inconvenience in the future, or from loss of earnings or earning power upon plaintiff's part in the future, unless you find from the evidence that it is reasonably certain that plaintiff will sustain such future damage, and then only for such period of time as it appears to be reasonably certain from the evidence that any such condition or damage will continue to exist. In other words, any such prospective or future damage, if any, is not to be allowed on the basis of possibilities or even probabilities, unless the evidence shows

that it is reasonably certain that plaintiff will sustain such future damage, if any, as you may allow."

This instruction, in addition to containing vices that were present in instruction No. 22, is highly argumentative. The drafter of the instruction artfully repeated, three times, the words "reasonably certain." The instruction was erroneous in using the word "shows." (See Hughes v. Medendorp, 294 Ill. App. 424, 429.)

Defendant contends that the trial court erred in refusing instruction No. 16, tendered by it. This instruction is an excerpt from the language of the court in the opinion in Cedar Rapids & I. C. Ry. Co. v. Sprague Elec. Co., 280 Ill. 386, 390, and the Supreme court in using the language in question was quoting from Sutherland on Damages. The case did not involve a claim for personal injuries. There the plaintiff sought damages from the defendant under a contract guaranteeing certain apparatus which had been sold to the plaintiff. Instruction No. 16 also contains indefinite terms such as "active duty," "reasonable exertions" and "unnecessarily enhanced."

Defendant contends that the trial court erred in refusing instruction No. 19, tendered by it. Defendant admits that "no Court of review in this State has had occasion to pass upon the propriety of giving or refusing an instruction of this nature." We think the trial court was fully justified in refusing to give the instruction. The instruction was calculated to confuse the jury upon the subject of damages. In the instant case the trial

court gave to the jury, at the instance of defendant, instructions No. 2 and No. 7. Instruction No. 2 reads as follows:

"In order to recover in this case the plaintiff must prove his case by a preponderance or greater weight of the evidence. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunity of the several witnesses for seeing or ascertaining from their own personal knowledge the things to which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the case; the relation or connection, if any, between the witnesses and the parties; the apparent consistency, fairness, and congruity of the evidence; the probability or improbability of the truth of their several statements in view of all of the other evidence, facts, and circumstances proved on the trial, and from all these circumstances determine upon which side is the preponderance or greater weight of the evidence."

Instruction No. 7 reads as follows:

"The burden of proof is upon the plaintiff and he must prove his case by the preponderance or greater weight of the evidence before he can recover. If you find that the evidence does not preponderate in favor of the plaintiff, or if you find that the evidence is evenly balanced so that you are in doubt or unable to say which side has the preponderance of the evidence, or if the evidence preponderates in favor of the defendant, then in either of

said events the plaintiff cannot recover, and you should find the defendant not guilty."

In tendering these last two instructions defendant conceded, in effect, what is the true rule in this State as to the quantum of proof required of plaintiff.

If within ten days from the filing of this opinion plaintiff files in this court a remittitur of $6,000, the judgment of the Circuit court of Cook county, against defendant, will be affirmed for $14,000; otherwise, the judgment will be reversed and the cause remanded for a new trial.

JUDGMENT AFFIRMED FOR $14,000
UPON REMITTITUR OF $6,000;
OTHERWISE JUDGMENT REVERSED
AND CAUSE REMANDED FOR A NEW
TRIAL.

Schwartz, P. J., and Friend, J., concur.

465

45123

ROBERT T. MAREN et al., Appellees,	)	APPEAL FROM SUPERIOR
v.	)	COURT, COOK COUNTY.
CARL E. WOLMER, Appellant.	)	

343 I.A. 353

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an action for breach of a contract not to engage in a certain business in a specified locality for a stated time.

On June 3, 1949, the Superior court of Cook county entered a decree awarding plaintiffs $3700 damages and costs. On June 23, 1949 defendant filed his motion to vacate the decree or in the alternative, for a new trial, which motion was denied on December 2, 1949. On December 19, 1949 defendant filed his notice of appeal, seeking to reverse the order and judgment heretofore entered.

On June 22, 1946, plaintiffs purchased defendant's electrical contracting business for $4500. The contract provided that the defendant would not engage in the business of electrical contracting in Oak Park or Forest Park, Illinois, for a period of five years. Defendant, however, was free during said five-year period to engage in the manufacture and sale of machine tools, electrical or otherwise, as well as the business of wiring or repairing motors, or any other manufacturing within the said towns.

The Chancellor after hearing evidence came to the conclusion that defendant had breached his promise not to engage in the electrical contracting business, and referred

the matter to a Master for an accounting. The Master heard the evidence as to the accounting, which is the only evidence preserved in the record, there being no report of proceedings of evidence adduced before the Chancellor. The Master recommended that judgment for $3700 be entered in favor of plaintiffs. He arrived at that figure by computing the value of the physical assets sold to plaintiffs and deducting that sum from the gross selling price, on the theory that the balance of the sale price must have been for good will which plaintiffs never received because of defendant's breach of contract. Defendant contends that this computation is erroneous.

No case has been cited, and we have been unable to find one in this or any other jurisdiction where this computation has been held to be the measure of damages in a case such as this. Plaintiffs are entitled to recover their damages for defendant's breach, and while damages in a case such as this may be difficult of ascertainment with any degree of exactness, some evidence must be presented that will furnish a reasonable basis for the determination.

The following statement in 12 R.C.L. 996, 997, clearly presents the law as to the proper measure of damages: "While the measure of damages in an action for the breach of an agreement by the seller not to re-enter business in competition with the buyer is usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact. But the plaintiff will be called upon, in order to recover substantial damages, to

furnish sufficient data to enable the jury, with a reasonable degree of certainty and exactness, to estimate the actual damages, and if he fails to do this he can recover only a nominal sum." The purchase price is not the criterion for the assessment of damages. Bauwens et al. v. Goethals, 187 Ill. App. 563.

Plaintiffs contend that "Where a decree recites the ultimate facts as proved and they are prima facie sufficient to sustain it, an appellant desiring a reversal of the decree on the ground that the evidence is not sufficient to sustain it must preserve the evidence by a certificate, otherwise the decree must be confirmed." The proper measure of damages is a question of law. The argument is not as to the amount of damages, which argument could not be made in the absence of a report of proceedings, but that the court adopted a formula for ascertaining the damages not supported by law. We believe the record filed properly preserved this question for review.

Plaintiffs next contend that the record was not certified to by the trial court and hence this appeal must be dismissed. There was no report of proceedings incorporated in the record and nothing for the trial court to certify. It is not necessary that the report of the master and the testimony taken by him be preserved by a report of proceedings in order that the same may become a part of the record. Strickland v. Washington Bldg. Corp., 287 Ill. App. 340. This appeal is presented on the plead-

ings filed, together with the master's report and findings and the question involved has been properly presented by the record.

Plaintiffs next contend that the notice of appeal was not filed within the time required by law. The decree was entered June 3, 1949 and defendant's motion to vacate was filed June 23, 1949, which motion was denied December 2, 1949. On December 19, 1949 defendant filed his notice of appeal. The law in this regard is set forth in Corwin v. Rheins, 390 Ill. 205, wherein the court stated: "If a party in interest in any judgment or decree which is final and appealable files a motion to vacate or set aside the same, the motion stays the running of the time within which the notice of appeal must be filed, and if the motion is disposed of on its merits during the thirty-day period or thereafter, the time for filing of a notice of appeal begins to run from the date such motion is disposed of."

Lenhart v. Miller, 375 Ill. 346, is to the same effect.

The notice of appeal was filed within 90 days from denial of the motion to vacate and the appeal was therefore properly perfected.

The record is confusing on the question as to whether there was an agreement that the difference between the value of the physical assets and the price paid should be the measure of damages. We have examined the record diligently for the purpose of arriving at some conclusion

in this respect, but we are unable to say that such a stipulation did exist. It may be that on rereference to the Master he would so find.

For the reasons indicated the decree of the Superior Court of Cook County is reversed and the cause remanded with directions to take such further proceedings as are consistent with the views herein expressed.

Decree reversed and cause
remanded with directions.

Friend and Scanlan, JJ., concur.

Abstract

Gen. No. 10453 Agenda No. 4.

IN THE

APPELLATE COURT OF THE 343 I.A. 354

STATE OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1951.

JOHN T. WILSON, AS ADMINISTRATOR OF THE ESTATE OF ROLAND L. KUTCH, DECEASED, Plaintiff and Appellee, vs. DONALD PETERS AND LINCOLN WEAVER, Defendants and Appellants.	Appeal from the Circuit Court of Iroquois County, Illinois.

WOLFE,-- P. J.

On the 19th day of November 1949, Roland L. Kutch was the owner of an automobile, which he was driving in a southerly direction on Route 115 in the County of Ford in the State of Illinois, at and near the intersection of Route 116. At the same time Donald Peters was operating a truck in a westerly direction along and upon Route 116, at or near the intersection of Route 115 in said County of Ford. The two cars collided and Roland L. Kutch received injuries from which he died.

John T. Wilson was appointed the Administrator of the Estate of Roland L. Kutch, deceased, and on February 23, 1950, he filed a suit in the Circuit Court of Iroquois County, in which he charged that Donald Peters was driving the truck owned by

Gen. No. 10452 Agenda No. 1.

IN THE

APPELLATE COURT OF THE

STATE OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1951.

JOHN T. WILSON, AS ADMINISTRATOR OF THE ESTATE OF ROLAND L. KUTCH, DECEASED, Plaintiff and Appellee,	)
vs.	)
DONALD PETERS AND LINCOLN NEAVER, Defendants and Appellants.	)

Appeal from the Circuit Court of Iroquois County, Illinois.

WOLFE,-- P. J.

On the 19th day of November 1949, Roland L. Kutch was the owner of an automobile, which he was driving in a southerly direction on Route 115 in the County of Ford in the State of Illinois, at and near the intersection of Route 116. At the same time Donald Peters was operating a truck in a westerly direction along and upon Route 116, at or near the intersection of Route 115 in said County of Ford. The two cars collided and Roland L. Kutch received injuries from which he died.

John T. Wilson was appointed the Administrator of the Estate of Roland L. Kutch, deceased, and on February 23, 1950, he filed a suit in the Circuit Court of Iroquois County, in which he charged that Donald Peters was driving the truck owned by

Lincoln Weaver, and that it was through their carelessness and negligence that plaintiff's intestate was killed. The complaint alleged that at the time of the accident in question, Roland L. Kutch was in the exercise of due care and caution for his own safety. The complaint charges many acts of negligence by the defendants which they claim was the proximate cause of the accident in question. The defendants filed their answer in which they deny all acts of negligence on their part, and deny that plaintiff's intestate was in the exercise of due care and caution for his own safety. The case was submitted to a jury that found the issues in favor of the plaintiff and assessed the damages at $7,500.00. The defendants entered a motion for a new trial and for judgment notwithstanding the verdict. The Court overruled both of said motions and entered judgment in favor of the plaintiff for $7,500.00, and from this judgment the defendants have prosecuted an appeal to this Court.

After the original briefs and arguments were filed in this Court, the plaintiff entered a motion to amend his complaint. A copy of the proposed amendment accompanied his motion and after consideration by the Court, the plaintiff was given leave to file the amendment, which was duly filed in this Court. It is our opinion that with the amendment the complaint states a good cause of action.

It is strenuously insisted by the appellants that the Court erred in admitting evidence tending to prove the due care and caution of the deceased just before, and at the time of the fatal collision. They claim that there was an eyewitness to the accident and therefore the careful care and habits of the deceased

Lincoln Weaver, and that it was through their carelessness and negligence that plaintiff's intestate was killed. The complaint alleged that at the time of the accident in question, Roland L. Kutch was in the exercise of due care and caution for his own safety. The complaint charges many acts of negligence by the defendants which they claim was the proximate cause of the accident in question. The defendants filed their answer in which they deny all acts of negligence on their part, and deny that plaintiff's intestate was in the exercise of due care and caution for his own safety. The case was submitted to a jury that found the issues in favor of the plaintiff and assessed the damages at $7,500.00. The defendants entered a motion for a new trial and for judgment notwithstanding the verdict. The Court overruled both of said motions and entered judgment in favor of the plaintiff for $7,500.00, and from this judgment the defendants have prosecuted an appeal to this Court.

After the original briefs and arguments were filed in this Court, the plaintiff entered a motion to amend his complaint. A copy of the proposed amendment accompanied his motion and after consideration by the Court, the plaintiff was given leave to file the amendment, which was duly filed in this Court. It is our opinion that with the amendment the complaint states a good cause of action.

It is strenuously insisted by the appellants that the Court erred in admitting evidence tending to prove the due care and caution of the deceased just before, and at the time of the fatal collision. They claim that there was an eyewitness to the accident and therefore the careful care and habits of the deceased

were not properly presented to the jury. Tom King, a passenger in the truck with Donald Peters at the time of the accident, testified on behalf of the defendants, and he stated positively that as they approached the intersection of Route 115 and 116, he did not see the Kutch car and did not see it at any time until after the accident in question. From reading the evidence as abstracted, we find no place in this record where anybody says that he saw the accident in question, and under the circumstances as presented in this case, we think the Court properly admitted such evidence.

It is seriously insisted by the appellants that the verdict is contrary to the evidence in the case, as the evidence shows clearly that the deceased, Kutch, was not in the exercise of due and ordinary care for his own safety. A witness, P. N. Ferguson, was called on behalf of the defendants and testified that he lived in, and conducted a filling station and grocery store near the intersections of highway No. 115 and 116; that he was looking out the front window of his place of business and saw the Kutch automobile being driven at a very fast rate of speed just before it entered the intersection prior to the collision.

This is the only witness who testified at all relative to the way the Kutch car was being driven. Before the evidence was heard in the case, the witnesses were separated. In rebuttal the plaintiff called Bertie Ferguson, the wife of P. N. Ferguson, who testified positively that at the time of the collision she was in her kitchen doing some work, with the door open into the

were not properly presented to the jury. Tom King, a passenger in the truck with Donald Peters at the time of the accident, testified on behalf of the defendants, and he stated positively that as they approached the intersection of Route 115 and 116, he did not see the Kutch car and did not see it at any time until after the accident in question. From reading the evidence as abstracted, we find no place in this record where anybody says that he saw the accident in question, and under the circumstances as presented in this case, we think the Court properly admitted such evidence.

It is seriously insisted by the appellants that the verdict is contrary to the evidence in the case, as the evidence shows clearly that the deceased, Kutch, was not in the exercise of due and ordinary care for his own safety. A witness, P. M. Ferguson, was called on behalf of the defendants and testified that he lived in, and conducted a filling station and grocery store near the intersections of highway No. 115 and 116; that he was looking out the front window of his place of business and saw the Kutch automobile being driven at a very fast rate of speed just before it entered the intersection prior to the collision.

This is the only witness who testified at all relative to the way the Kutch car was being driven. Before the evidence was heard in the case, the witnesses were separated. In rebuttal the plaintiff called Bertie Ferguson, the wife of P. M. Ferguson, who testified positively that at the time of the collision she was in her kitchen doing some work, with the door open into the

front room and that her husband was sound asleep on a davenport in the front room of their home; that he was lying in such a position that it would be impossible for him to see out of the window, or to see the Kutch car, either at, or before the time of the accident in question. The jury who is the judge of the credibility of all witnesses that appear before them, had a chance not only to hear, but see the witnesses as they testified, and evidently they gave a great deal more credence to what Mrs. Ferguson said than to her husband. It is the province of the jury to pass upon all evidence presented before them, and unless a court of review can say that their verdict is contrary to the manifest weight of the evidence, we would not be justified in reversing the judgment. From a review of all of the evidence in this case as shown by the abstract, it is our conclusion that the verdict of the jury is not against the manifest weight of the evidence in this case.

Appellants complain that the instructions given by the trial court were erroneous. We have examined these instructions and we think that they fairly represent the law applicable to the facts in this case. They object to the ruling of the Court in refusing to give certain of the defendants' tendered instructions. Instruction No. 2 complained of, assumed that Route 116 was a preferential highway, and there is some dispute in the evidence whether this is true, and under such circumstances the Court properly refused this instruction. Defendants' refused Instruction No. 3 does not correctly state the law. This instruction also assumes that highway No. 116 was a preferential road, and that a car driving onto this road from a side road should yield the right

front room and that her husband was sound asleep on a davenport in the front room of their home; that he was lying in such a position that it would be impossible for him to see out of the window, or to see the Hutch car, either at, or before the time of the accident in question. The jury who is the judge of the credibility of all witnesses that appear before them, had a chance not only to hear, but see the witnesses as they testified, and evidently they gave a great deal more credence to what Mrs. Ferguson said than to her husband. It is the province of the jury to pass upon all evidence presented before them, and unless a court of review can say that their verdict is contrary to the manifest weight of the evidence, we would not be justified in reversing the judgment. From a review of all of the evidence in this case as shown by the abstract, it is our conclusion that the verdict of the jury is not against the manifest weight of the evidence in this case.

Appellants complain that the instructions given by the trial court were erroneous. We have examined these instructions and we think that they fairly represent the law applicable to the facts in this case. They object to the ruling of the Court in refusing to give certain of the defendants' tendered instructions. Instruction No. 2 complained of, assumed that Route 116 was a preferential highway, and there is some dispute in the evidence whether this is true, and under such circumstances the Court properly refused this instruction. Defendants' refused instruction No. 3 does not correctly state the law. This instruction also assumes that highway No. 116 was a preferential road, and that a car driving onto this road from a side road should yield the right

of way, regardless of the position of the oncoming car. This instruction was also erroneous. We think Instruction No. 5 is similar in effect as to the others. Refused Instruction No. 6 is subject to the same criticism. Refused Instruction No. 4 is similar to others, only stated in different language.

Defendants' Instruction No. 1 is in regard to the weight or preponderance of the evidence and uses the phrase "or if the evidence is equally balanced so that you are unable to say on which side is the greater weight of the evidence," etc. This instruction has been repeatedly condemned by the Courts and the trial court properly refused to give the same.

Complaint is made as to the cross-examination of defendants' witness, P. N. Ferguson. Probably some of the questions brought out on cross-examination were not pertinent to the issues in the case, but it is difficult to see in what manner the jury could be in any way prejudiced against the defendants by this cross-examination. We think it is proper for the plaintiff to question Mr. Ferguson's recollection as to whether he had talked to any one else in regard to his testimony. It is also insisted that the attorney for the plaintiff had tried to bring out from the witness, Ferguson, that the defendants carried insurance. From reading this testimony we are unable to see how the jury could possibly believe that that was the purpose of this cross-examination.

From a review of the evidence and record in this case, it is our conclusion that the defendants had a fair and impartial trial, and that there is no reversible error in the case, and the judgment of the trial court should be affirmed.

Judgment affirmed.

of way, regardless of the position of the oncoming car. This instruction was also erroneous. We think Instruction No. 5 is similar in effect as to the others. Refused Instruction No. 6 is subject to the same criticism. Refused Instruction No. 4 is similar to others, only stated in different language.

Defendants' Instruction No. 1 is in regard to the weight or preponderance of the evidence and uses the phrase "or if the evidence is equally balanced so that you are unable to say on which side is the greater weight of the evidence," etc. This instruction has been repeatedly condemned by the Courts and the trial court properly refused to give the same.

Complaint is made as to the cross-examination of defendants' witness, F. M. Ferguson. Probably some of the questions brought out on cross-examination were not pertinent to the issues in the case, but it is difficult to see in what manner the jury could be in any way prejudiced against the defendants by this cross-examination. We think it is proper for the plaintiff to question Mr. Ferguson's recollection as to whether he had talked to any one else in regard to his testimony. It is also insisted that the attorney for the plaintiff had tried to bring out from the witness, Ferguson, that the defendants carried insurance. From reading this testimony we are unable to see how the jury could possibly believe that that was the purpose of this cross-examination.

From a review of the evidence and record in this case, it is our conclusion that the defendants had a fair and impartial trial, and that there is no reversible error in the case, and the judgment of the trial court should be affirmed.

Judgment affirmed.

Abstract

No. 10489

Abstract

343 I.A. 355

In the

APPELLATE COURT OF ILLINOIS

Second District

February Term, A. D. 1951

H. H. KOLBERG, Plaintiff-Appellant,	)	Appeal from Circuit Court, Winnebago County.
vs.	)	Honorable William R. Dusher, Judge Presiding.
CITIES SERVICE OIL COMPANY, a corporation, Defendant-Appellee.	)	

BRISTOW, J. -- Plaintiff, H. H. Kolberg, is appealing from a judgment in the amount of $100, entered in his favor by the circuit court of Winnebago County, in a trial without a jury, against the defendant, Cities Service Oil Company, for its alleged breach of contract.

The sole issue in this cause is whether the circuit court erred in the computation of plaintiff's damages, by failing to include his loss of prospective profits.

The facts and inferences therefrom are controverted, and will be considered herein insofar as they may be material in determining the propriety of the damages awarded. Plaintiff was the sole operator of a service station

No. 10499

Abstract

In the

APPELLATE COURT OF ILLINOIS

Second District

February Term, A. D. 1931

H. E. KOLBERG, Plaintiff-Appellant,	Appeal from Circuit Court, Stephenson County.
vs.	
CITIES SERVICE OIL COMPANY, a corporation, Defendant-Appellee.	Honorable William H. Fisher, Judge Presiding.

MAINSON, J. -- Plaintiff, H. E. Kolberg, is appealing from a judgment in the amount of $100, entered in his favor by the circuit court of Stephenson County, in a trial without a jury, against the defendant, Cities Service Oil Company, for its alleged breach of contract.

The sole issue in this case is whether the circuit court erred in the computation of plaintiff's damages, by failing to include his loss of prospective profits.

The facts and inferences therefrom are controverted, and will be considered herein insofar as they may be material in determining the propriety of the damages awarded. Plaintiff was the sole operator of a service station

leased from defendant. The parties had also executed certain contracts whereby plaintiff agreed to buy, and defendant agreed to sell, gasoline, enumerated petroleum products, and automotive accessories. Prior to defendant's alleged breach of these contracts, there was a dispute, culminating in litigation, over the termination provisions of the lease.

The original lease covered a term from March 1, 1946 to the last day of April 1947, and was subject to renewal, unless there was proper notice of termination. Under plaintiff's copy of the lease, notice of termination was required 60 days prior to the expiration of the lease, whereas under defendant's copy, only 30 days notice was necessary. On March 18, 1948 defendant endeavored to give plaintiff notice of termination of the lease as of the end of April, 1948. However, defendant thereafter wrote plaintiff that it would allow him to continue on a month to month tenancy. Plaintiff insisted that he had a valid lease until the end of April 1949 by virtue of the renewal provisions, and defendant's failure to give the required 60 day notice. In July 1948 defendant notified plaintiff of the termination of the alleged month to month tenancy as of the end of August, and in September defendant sued for possession of the premises. In that litigation the court, in a judgment entered on a jury verdict, upheld the validity of plaintiff's lease.

During the pendency of that dispute, defendant allegedly breached its contract with plaintiff for the delivery of gasoline. According to plaintiff's testimony, on August 29, 1948, defendant informed him that as far as defendant was concerned, plaintiff was "out of business." This assertion, as well as plaintiff's testimony of subsequent refusals to deliver gasoline by defendant, were corroborated by defendant's former driver, who left the company thereafter with high recommendations and on his own accord.

This driver testified that he had been directed not to deliver gasoline to plaintiff; and that there were occasional deliveries, but only when specially authorized by the supervisor. He denied that plaintiff had ever refused to pay for the gasoline until after it was poured into the tank, or that defendant would deliver gasoline provided plaintiff would pay cash on delivery. He did state that on one occasion plaintiff had submitted a check which included rent, and the driver refused to accept it since he was given instructions to take only cash payment for gasoline, although prior thereto plaintiff had, on numerous occasions, tendered the payment of gasoline and rent in one check.

leased from defendant. The parties had also executed certain contracts whereby plaintiff agreed to buy, and defendant agreed to sell, gasoline, enumerated petroleum products, and automotive accessories. Prior to defendant's alleged breach of these contracts, there was a dispute, culminating in litigation, over the termination provisions of the leases.

The original lease covered a term from March 1, 1946 to the last day of April 1947, and was subject to renewal, unless there was proper notice of termination. Under plaintiff's copy of the lease, notice of termination was required 60 days prior to the expiration of the lease, whereas under defendant's copy, only 30 days notice was necessary. On March 14, 1948 defendant endeavored to give plaintiff notice of termination of the lease as of the end of April, 1948. However, defendant thereafter wrote plaintiff that it would allow him to continue on a month to month tenancy. Plaintiff insisted that he had a valid lease until the end of April 1948 by virtue of the renewal provisions, and defendant's failure to give the required 60 day notice. In July 1948 defendant notified plaintiff of the termination of the alleged month to month tenancy as of the end of August, and in September defendant sued for possession of the premises. In that litigation the court, in a judgment entered on a jury verdict, upheld the validity of plaintiff's lease.

During the pendency of that dispute, defendant allegedly breached its contract with plaintiff for the delivery of gasoline. According to plaintiff's testimony, on August 29, 1948, defendant informed him that as far as defendant was concerned, plaintiff was "out of business." This assertion, as well as plaintiff's testimony of subsequent refusals to deliver gasoline by defendant, were corroborated by defendant's former driver, who left the company thereafter with high recommendations and on his own accord.

This driver testified that he had been directed not to deliver gasoline to plaintiff; and that there were occasional deliveries, but only when specially authorized by the supervisor. He denied that plaintiff had ever refused to pay for the gasoline until after it was poured into the tank, or that defendant would deliver gasoline provided plaintiff would pay cash on delivery. He did state that on one occasion plaintiff had submitted a check which included rent, and the driver refused to accept it since he was given instructions to take only cash payment for gasoline, although prior thereto plaintiff had, on numerous occasions, tendered the payment of gasoline and rent in one check.

There was further testimony by plaintiff that he purchased gasoline and oil from other companies, after having been refused delivery by defendant, but that gasoline was difficult to purchase on the open market. He offered in evidence proof of the amount of business he did for the five months preceding defendant's alleged breach of contract, together with proof of the amount of business he did during the following eight months until the expiration of his lease. Plaintiff then showed the average monthly profit for the periods both before and after the alleged breach, and subtracted the latter figure from the former to ascertain the average loss per month. This average loss was then multiplied by the number of months during which deliveries were presumably refused, and this figure, amounting to $1,221.76, was submitted by him as his estimated loss of profit. In connection therewith, plaintiff also submitted evidence that there were several new public construction projects nearby, which would have tended to increase his business over what it had been prior to the curtailment.

On behalf of defendant, the supervisor of the company denied that he had told plaintiff that he was "out of business," and stated that whenever plaintiff called in for gasoline he received deliveries. He admitted that after April 30, 1948 he did talk with plaintiff at the gas station about the lease, and the fact that defendant wanted possession of the station, and had endeavored to put the lease on a month-to-month basis. He also admitted that deliveries to plaintiff were directed to be on a cash basis, and that on November 16, 1948 someone from the defendant company wrote plaintiff that defendant would make deliveries of petroleum products in the customary manner and on the usual basis. One of defendant's other drivers stated, in corroboration, that one of plaintiff's checks included payment for rent as well as gasoline, and that since the driver was told, in August, to accept only cash, the gasoline was not poured into the tanks.

On the basis of substantially the foregoing evidence, the court entered a judgment in plaintiff's favor in the amount of $100, from which plaintiff has prosecuted this appeal on the ground that damages are inadequate. Plaintiff maintains that if he is entitled to recover at all for defendant's breach of contract, he should be entitled to receive the full measure of his loss as presented by the evidence.

Defendant contends, however, that plaintiff is not entitled to any damages, inasmuch as his own non-performance, by including the rent in the check for the payment of gasoline, justified defendant's failure to perform; that, at most, plaintiff was entitled to the loss sustained on the specific occasions when

There was further testimony to plaintiff that he purchased gasoline and oil from other companies, after having been refused delivery by defendant, but that gasoline was difficult to purchase on the open market. He offered in evidence proof of the amount of business he did for the five months preceding defendant's alleged breach of contract, together with proof of the amount of business he did during the following eight months until the termination of his lease. Plaintiff then showed the average monthly profit for the periods both before and after the alleged breach, and subtracted the latter figure from the former to ascertain the average loss per month. This average loss was then multiplied by the number of months during which deliveries were prevented, and this figure, amounting to $1,283.78, was computed by him as his estimated loss of profit. In connection therewith, plaintiff also submitted evidence that there were several new public construction projects nearby, which would have tended to increase his business over what it had been prior to the curtailment.

On behalf of defendant, the superintendent of the company denied that he had told plaintiff that he was "out of business," and stated that whenever plaintiff called in for gasoline he received deliveries. He admitted that after April 30, 1948 he did talk with plaintiff at the gas station about the lease, and the fact that defendant wanted possession of the station, and had endeavored to put the lease on a month-to-month basis. He also admitted that deliveries to plaintiff were directed to be on a cash basis, and that on November 15, 1948 someone from the defendant company wrote plaintiff that defendant would make deliveries of petroleum products in the customary manner and on the usual basis. One of defendant's other drivers stated, in corroboration, that one of plaintiff's checks included payment for rent as well as gasoline, and that since the driver was told, in error, to accept only cash, the gasoline was not entered into the books.

On the basis of substantially the foregoing evidence, the court entered a judgment in plaintiff's favor in the amount of $100, from which plaintiff has prosecuted this appeal on the ground that damages are inadequate. Plaintiff maintains that if he is entitled to recover at all for defendant's breach of contract, he should be entitled to receive the full measure of his loss as presented by the evidence.

Defendant contends, however, that plaintiff is not entitled to any damages, inasmuch as his own non-performance, by tendering the rent in the check for the payment of gasoline, justified defendant's failure to perform rent, at most, plaintiff was entitled to the loss sustained on the specific occasions upon

defendant refused to make deliveries, referred to in plaintiff's Bill of Particulars; and that plaintiff's anticipated profits were too speculative to warrant recovery for their loss.

From our examination of the record, it is apparent that in entering judgment against defendant, the trial court, acting as the trier of fact, found that defendant breached its contract to deliver gasoline to plaintiff. That factual determination is amply supported by the evidence, and, therefore, should not be disturbed on appeal. (Moore v. Schoen, 313 Ill. App. 367.)

We cannot sustain defendant's argument that plaintiff's conduct justified defendant's failure to perform, inasmuch as the sequence of events shows that prior to the controversy defendant had accepted checks from plaintiff which included both rent and payment for gasoline deliveries. Moreover, defendant refused to make deliveries to plaintiff even before plaintiff offered the allegedly objectionable check. The cessation of deliveries was coincidental with defendant's efforts to terminate the lease and secure possession of the premises by the end of August 1948, and would tend to indicate that the defendant's act was not in consequence of plaintiff's mode of payment.

It is not clear, furthermore, that defendant at any time regarded plaintiff's payment as a breach of contract, for defendant wrote him on November 16, 1948, that it would make deliveries to plaintiff in the customary manner, thereby inferring that it had not done so in the past, and in no way imposing blame or legal onus on plaintiff. Therefore, it is evident that the judgment in favor of plaintiff should be properly affirmed.

In determining whether the circuit court erred in assessing the amount of damages due plaintiff under this judgment, we are cognizant of the prevailing judicial reluctance to interfere with such awards in the absence of special circumstances, or an apparent oversight in the consideration of the elements in the cause. (25 C. J. S. 910.) Unless the amount of recovery for a breach of contract is a mere matter of computation, the propriety of an award depends upon the particular facts involved, and a court will ordinarily compare the amount awarded with the evidence. (25 C. J. S. 911, 994.)

In the instant case, it is apparent that the circuit court, in awarding plaintiff damages in the amount of $100, did not compute or take into consideration the elements of plaintiff's loss of prospective profits. Defendant insists

defendant refused to make deliveries, referred to in plaintiff's bill of particulars; and that plaintiff's anticipated profits were too speculative to warrant recovery for their loss.

Upon our examination of the record, it is apparent that in entering judgment against defendant, the trial court, acting as the trier of fact, found that defendant breached its contract to deliver gasoline to plaintiff. That factual determination is amply supported by the evidence, and, therefore, should not be disturbed on appeal. (Moore v. Cohen, 318 Ill. App. 387.)

We cannot sustain defendant's argument that plaintiff's counsel justified defendant's failure to perform, inasmuch as the sequence of events shows that prior to the controversy defendant had accepted checks from plaintiff which included both rent and payment for previous deliveries. Moreover, defendant refused to make deliveries to plaintiff even before plaintiff offered the allegedly objectionable check. The cessation of deliveries was coincidental with defendant's efforts to terminate the lease and secure possession of the premises by the end of August 1943, and would tend to indicate that the defendant's act was not in consequence of plaintiff's mode of payment.

It is not clear, furthermore, that defendant at any time repudiated plaintiff's payment as a breach of contract, for defendant wrote him on November 15, 1948, that it would make deliveries to plaintiff in the customary manner, thereby indicating that it had not done so in the past, and in no way imposing blame or legal cause on plaintiff. Therefore, it is evident that the judgment in favor of plaintiff should be properly affirmed.

In determining whether the circuit court erred in assessing the amount of damages due plaintiff under this judgment, we are cognizant of the prevailing judicial reference to interfere with such awards in the absence of special circumstances, or an apparent oversight in the consideration of the elements in the cause. (23 C. J. S. 310.) Unless the amount of recovery for a breach of contract is a mere matter of computation, the propriety of an award depends upon the particular facts involved, and a court will ordinarily assess the amount awarded with the evidence. (23 C. J. S. 311, 324.)

In the instant case, it is apparent that the circuit court, in awarding plaintiff damages in the amount of $100, did not consider or take into consideration the elements of plaintiff's loss of prospective profits. Defendant treats

that not only were such profits too speculative, but that plaintiff was entitled at most to the loss sustained on the three occasions when defendant refused to make deliveries, specified in plaintiff's Bill of Particulars.

The Bill of Particulars is designed to apprise the opposing party of claims made, in order to guide him in his trial preparation, and ordinarily a party is limited to proof of the matters particularized. (O'Brien v. Brown, 403 Ill. 183.) Hence, plaintiff herein could not have offered proof of additional refusals by defendant to make deliveries. Nevertheless, plaintiff was not limited in his proof of loss to the amounts of gasoline ordered on these three occasions, for, having been refused deliveries, plaintiff was not obliged to continue his requests indefinitely, and was entitled to assume that further demands would be unavailing. Therefore, plaintiff was justified in endeavoring to procure gasoline elsewhere, or, if that proved impossible, in regarding the ensuing consequences as a loss. He should not have to prove a request and a refusal each day before computing a loss for a given period.

With reference to the proof of such losses submitted by plaintiff, it is established that the Illinois courts have allowed recovery for loss of prospective profits where they can be estimated with reasonable certainty by any criteria. (Ind. Nat. Gas Co. v. Sunflower Nat. Gas Co., 330 Ill. App. 343.) The basis of measurement of the loss is the profit record for a reasonable period immediately preceding the breach of contract. (Schmitt v. Continental Diamond Fibre Co., 340 Ill. App. 221; Billeter v. Halsam Prod. Co., 313 Ill. App. 145; Moore v. Schoen, supra.)

In Barnett v. Caldwell Furniture Co., 277 Ill. 286, the Illinois Supreme Court stated:

> "All the law requires in cases of this character is that the evidence shall with a fair degree of probability tend to establish a basis for the assessment of damages."

In Moore v. Schoen, supra, which is closely analogous to the case at bar, in that defendants therein refused to make deliveries of petroleum products under a contract with the plaintiff, the court held that evidence of the amounts of sales, and profits therefrom, made by plaintiff for three full months prior to the severance of the contract relation was a sufficient basis upon which to estimate plaintiff's profits in the future. The court denied defendant's contention that there was no sufficient allegation and proof of loss of profits under those circumstances.

that not only were such profits too speculative, but that plaintiff was entitled at most to the loss sustained on the three occasions when defendant refused to make deliveries, specified in plaintiff's Bill of Particulars.

The Bill of Particulars is designed to apprise the opposing party of claims made, in order to guide him in his trial preparation, and ordinarily a party is limited to proof of the matters particularized. (O'Brien v. Brown, 408 Ill. 183.) Hence, plaintiff herein could not have offered proof of additional refusals by defendant to make deliveries. Nevertheless, plaintiff was not limited in his proof of loss to the amount of gasoline ordered on these three occasions, for, having been refused deliveries, plaintiff was not obliged to continue his requests indefinitely, and was entitled to assume that further demands would be unavailing. Therefore, plaintiff was justified in endeavoring to procure gasoline elsewhere, or, if that proved impossible, in regarding the ensuing consequences as a loss. He should not have to prove a request and a refusal each day before computing a loss for a given period.

With reference to the proof of such losses submitted by plaintiff, it is established that the Illinois courts have allowed recovery for loss of prospective profits where they can be estimated with reasonable certainty by any criteria. (Ind. Nat. Gas Co. v. Sunflower Nat. Gas Co., 230 Ill. App. 248.) The basis of measurement of the loss is the profit record for a reasonable period immediately preceding the breach of contract. (Schmitt v. Continental Diamond Fibre Co., 340 Ill. App. 201; Miller v. McKesson Prod. Co., 318 Ill. App. 148; Moore v. Sohsen, supra.)

In Bennett v. Caldwell Furniture Co., 277 Ill. 288, the Illinois Supreme Court stated:

> "All the law requires in cases of this character is that the evidence shall with a fair degree of probability tend to establish a basis for the assessment of damages."

In Moore v. Sohsen, supra, which is closely analogous to the case at bar, in that defendants therein refused to make deliveries of petroleum products under a contract with the plaintiff, the court held that evidence of the amounts of sales, and profits therefrom, made by plaintiff for three full months prior to the commencement of the contract relation was a sufficient basis upon which to estimate plaintiff's profits in the future. The court denied defendant's contention that there was no sufficient allegation and proof of loss of profits under those circumstances.

Defendant herein does not distinguish or discuss these cases but merely reiterates rules rejecting speculative damages, and claims that plaintiff's account is not satisfactory since it refers to gross profits, fails to include the several deliveries made by defendant during the period of alleged breach, and fails to minimize damages.

The objection to gross profits as a basis for computing damages for the loss of prospective profits, asserted for the first time on appeal, is not only untimely, but does not affect the applicability of the rule of law promulgated in the Schoen case, and other decisions, requiring only the presentation of a reasonable criteria with a fair degree of probability, which can be used as a basis for estimating prospective profits.

The evidence herein indicates, furthermore, that plaintiff did endeavor to secure gasoline elsewhere, and thereby minimize his loss. In fact, such purchases were included in his computation of his profits during the period of defendant's alleged breach of contract. The record is not clear whether the occasional deliveries of gasoline by defendant to plaintiff from September 1948 to April 1949 were included in plaintiff's computation of his purchases and profits. This fact should not deprive plaintiff of his right to recover damages for the loss of all prospective profits, but would merely affect the extent of the loss which he should properly be permitted to recover.

Under the foregoing analysis, it is evident that plaintiff's loss of prospective profits was presented in accordance with criteria approved by the court, and constituted an element of damage which the trial court failed to include in its award. It is our opinion, therefore, that although the judgment of the circuit court against the defendant should properly be affirmed, inasmuch as the award of damages was insufficient, the cause should be reversed and remanded in part so that the court may modify the damages in accordance with the evidence.

JUDGMENT AFFIRMED IN PART AND
REVERSED AND REMANDED AS TO THE REMAINDER

Defendant herein does not distinguish or discuss the case but merely [illegible] rules regarding speculative damages, and claims that plaintiff's account is not satisfactory since it refers to gross profits, fails to include the normal deductions made by defendant during the period of alleged breach, and fails to minimize damages.

The objection to gross profits as a basis for computing damages for the loss of prospective profits, asserted for the first time on appeal, is not only untimely, but does not affect the applicability of the rule of law promulgated in the Gibson case, and other decisions, requiring only the ascertainment of a reasonable certainty with a fair degree of probability, which can be seen here as a basis for estimating prospective profits.

The evidence herein indicates, furthermore, that plaintiff did endeavor to secure gainful employment, and thereby minimize his loss. In fact, such efforts were included in his computation of his profits during the period of defendant's alleged breach of contract. The record is not clear whether the occasional deliveries of products by defendant to plaintiff from September 1963 to April 1969 were included in plaintiff's computation of his profits and losses. This fact should not deprive plaintiff of his right to recover damages for the loss of all prospective profits, but would merely affect the extent of the loss which he should properly be permitted to recover.

Under the foregoing analysis, it is evident that plaintiff's loss of prospective profits was proven in accordance with criteria approved by the courts, and constituted an element of damage which the trial court failed to include in its award. It is our opinion, therefore, that judgment of the circuit court against the defendant should properly be affirmed, insofar as the award of damages was insufficient, the cause should be reversed and remanded in part so that the court may modify the damages in accordance with the evidence.

JUDGMENT AFFIRMED IN PART AND
REVERSED AND REMANDED IN PART WITH DIRECTIONS

45221

VIVIAN STURGEON, Appellee,	)	
v.	)	APPEAL FROM COUNTY COURT OF COOK COUNTY.
NATHAN E. JACOBS and MORRIS E. JACOBS, copartners, doing business as BOZELL & JACOBS, and BOZELL & JACOBS, INC., a corporation, Appellants.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action at law to recover the sum of $1,323.48 that plaintiff claims was due her from defendants under a written contract between the parties. After the cause was at issue plaintiff filed a verified motion, under the statute, for summary judgment in the sum of $1,323.48. Defendants filed objections to the motion and on March 8, 1950, the trial court granted the motion of plaintiff and entered judgment in the sum of $1,323.48. Defendants appeal.

The complaint alleges that on or about August 16, 1946, the parties entered into an oral agreement by the terms of which defendants employed plaintiff as an account executive, her services to commence September 1, 1946, and to continue until terminated by mutual agreement, and the compensation was fixed at 7-1/2% on billings to advertisers and 50% on advertising service fees; that on August 17, 1946, the agreement was reduced to writing, and reads as follows:

"This will confirm our agreement made in my office on August 16, 1946, relative to your association with The

Jacobs Company, Inc., and Bozell & Jacobs, which is to start on or before September 1, 1946.

"You are to receive on all accounts you bring in, and on accounts you handle for our company, a compensation of 7-1/2% on billing and 50% on advertising service fees, until such time as your monthly income is on an annual basis of $15,000. When your total billing reaches $200,000, or its equivalent, then you will continue to receive the same monthly income until your billing increases over $300,000, at which time your commission will be on a 5% basis rather than a 7-1/2% basis.

"You are also to receive the same percentage on profits from public relations accounts you bring in or handle for the office.

"You are privileged to continue handling local accounts independently of the Agency, solely for your own profit, until you reach and maintain an Agency income of $15,000 annually.

"Please sign the enclosed carbon and it will serve as a contract between you and the agency for a period of one year, to be renewable if mutually agreed by you and the agency.

"Sincerely yours

"THE JACOBS COMPANY, INC.

"By Nathan E. Jacobs
"NATHAN E. JACOBS, President.

"Vivian Sturgeon
"MISS VIVIAN STURGEON

"September 13, 1946
"DATE"

The complaint alleges that plaintiff serviced various accounts, among them the accounts of Foot-Pleasure Shoe Company and John Munro, Inc.; that there was due plaintiff the sum of $1,250.00 under the minimum agency fee of $2,500.00 per year from the Foot-Pleasure Shoe Company account, on which $331.52 was paid, leaving an unpaid balance of $918.48; that the gross billing to John Munro, Inc., totaled $8,904.98, on which plaintiff was entitled to 7-1/2%, or $667.87, on which $262.87 was paid, leaving a balance due of $405.00. Defendants, in their brief, state that "the answer of defendants admitted all of the allegations of the complaint except those relating to the amounts due plaintiff, and denied that the plaintiff was entitled to receive the sums mentioned in the complaint"; that the answer alleges that "Exhibit 'A' [the written agreement] was entered into in the light of an established use and custom in the advertising business to the effect that commissions were payable to account executives only when the advertisers made payment of the billings to the agency." While the answer of defendants also alleges that plaintiff made false representations in reference to the credit of John Munro, Inc., and that in reliance thereon defendants permitted plaintiff to place further advertising with that firm, but that the billings were not paid and therefore there was nothing due plaintiff upon that account, this last allegation is apparently abandoned, as it is not raised in this court.

The motion for summary judgment alleges, inter alia,

that plaintiff "did service said Foot-Pleasure Shoe Company account for the year commencing September 10th, 1946, and there became due to the defendant from the Foot-Pleasure Shoe Company on said account, a minimum agency fee of $2,500.00 per year; that under the terms of said contract there became due thereon to plaintiff 50% of such fee, namely, the sum of $1,250.00; that defendants have paid thereon the sum of $331.52, leaving due and unpaid to plaintiff the sum of $918.48 on said account.

"8. That with reference to the John Munro, Inc. account, said account commenced January 31st, 1947, and is as follows:

"'Bozell & Jacobs Name John Munro, Inc.

Copy of Ledger Sheet.

1947			
Jan. 31	Inv. No.	2113	164.86
Feb. 28		2296	936.12
		2314	1,483.42
		2318	125.00
Mar. 31		2344	679.87
		2441	1.00
		2451	224.00
		2473	64.44
		2481	1,965.32
Apr. 30		2546	2.33
		2571	625.00
May 31		2703	2,002.92
		2771	5.70
		2882	625.00
		total	8,904.98
		Sales-	$8,904.98'

"That on said John Munro, Inc. account the plaintiff is entitled to 7-1/2% of the gross billing to said account; that the gross billing to said account was the

sum of $8,904.98; that plaintiff became entitled to 7-1/2% thereof, namely, the sum of $667.87; that defendant has paid thereon to plaintiff the sum of $262.87, leaving due and unpaid to plaintiff thereon the sum of $405.00.

"9. That plaintiff on her part has duly performed all the terms and conditions of said agreement by her to be performed in connection with said accounts and in connection with her employment.

"10. That the defendants became obligated to pay to plaintiff the sums earned as hereinabove set forth, and have not performed said agreement in this, to-wit, that defendants have failed to pay to plaintiff the sum of $918.48 due on said account of Foot-Pleasure Shoe Company, and $405.00 due on said account of John Munro, Inc.

"11. That there is, therefore, due on said Foot-Pleasure Shoe Company account and said John Munro, Inc. account to your affiant the sum of $1,323.48, for which your affiant, as plaintiff, asks judgment."

The sole objections filed to the motion for summary judgment by defendants are:

"(1) The contract upon which plaintiff sues is silent as to when compensation thereunder is earned and becomes payable. In view of this ambiguity in the contract, and particularly in view of the fact that the contract was largely prepared by the plaintiff, defendant is entitled to introduce evidence as to the surrounding circumstances attendant upon the execution thereof on these questions. Defendant has pleaded the existence of a

custom and usage in the advertising business to the effect that the compensation of advertising account executives employed upon a commission basis is not earned until the billings rendered to the agency clients for advertising placed with various advertising media have been paid and the agency's discount on such billings has been earned. There is, therefore, in this case, a triable issue of facts as to the existence and scope of the custom and usage pleaded, and therefore there is no basis for a summary judgment.

"(2) In connection with the John Munro, Inc. account, defendant has also pleaded the express oral assumption of the credit risk by plaintiff. This presents a further triable issue of fact which makes a summary judgment inappropriate."

As heretofore stated, the point made by defendants under paragraph (2) has not been raised in this court, and, therefore, the sole objection raised here to the entry of the summary judgment is: "The answer of defendants as well as the affidavit filed in support of their objections to the motion for summary judgment set forth the existence of a well-known custom or usage in the advertising business to the effect that the Agency paid commissions on billings only when the billings were paid to the agency. This allegation was valid at law and created an issue in fact," and, therefore, "the trial court erred in entering summary judgment in favor of plaintiff in the light of the issue

as to the custom in the industry. If indeed it were the custom, as we contend the evidence would show, that account executives are paid only when their customers or clients pay their charges to the agency, it would then be incumbent upon plaintiff to show, before she could recover, that the billings upon which she based her commissions had been paid. This issue could not be decided by affidavits, nor in any manner which deprived the defendants of a trial of the issue and a determination as to the truth or falsity of the defense by a competent trier of facts." Defendants' position, in our judgment, is without merit because the written contract between plaintiff and defendants is plain and complete in its terms, and, therefore, the alleged custom or usage cannot be set up to vary or control the express terms of the contract. Many years ago the Supreme court, in Dixon v. Dunham, 14 Ill. 324, stated (p. 326):

"No usage or custom can be admitted to vary or control the express terms of a contract, but they may be admitted to determine that, which by the contract is left undetermined. The parties, by their contract, may abrogate any custom, no matter how ancient or uniform, but such custom cannot abrogate the terms of a contract. Whenever there is a conflict, the contract must control."

That rule has become the established law of this State. As stated in Sondag v. Keefe, 251 Ill. App. 378, 381:

"* * * The law is well settled that a usage or

custom cannot be proven for the purpose of evading the express provisions of a contract or a statute. The proposition is so well settled that it is unnecessary to cite authorities."

None of several cases cited by defendants run counter to that rule. In El Reno Grocery Co. v. Stocking, 293 Ill. 494, cited by defendants, the rule is cited with approval.

Two accounts (neither a public relations account) are involved in plaintiff's suit - one known as the Foot-Pleasure Shoe Company account, and the other, the John Munro, Inc., account. It is admitted that plaintiff fully performed as to these two accounts under the terms of the written contract, and the sole defense interposed is, that if the said custom or usage be read into the contract, as defendants contend it should be, it created an issue of fact and therefore the entry of the summary judgment was not justified. The record shows that the contract was drafted by the president of the defendant corporation and that it was then tendered to plaintiff to sign, with the statement that "it will serve as a contract between you and the agency for a period of one year, to be renewable if mutually agreed by you and the agency." In Adams and Westlake Mfg. Co. v. Cook, 16 Ill. App. 161, the court states (p. 165):

"It is a very familiar principle that where the parties to a contract reduce the same to writing, the law

presumes that all the terms and conditions of the agreement are fully incorporated into and become a part of the written contract, so that the writing becomes the only evidence of the terms of the agreement. It follows that the intention of the parties is to be ascertained solely from a proper construction or interpretation of the language employed by the parties in the instrument itself. Where that language is plain and unambiguous, it must be enforced according to its obvious meaning, * * * the intention which the courts will enforce must, after all, be that which is expressed in the writing. An intention of either or both the parties different from the one so expressed can not be regarded.

"It is also a well settled rule of law, that the interpretation or construction of written contracts is a question of law for the court and not one of fact for the jury."

The record also shows that the written contract followed an oral agreement that was made between the parties and it is clear, therefore, that the terms of the written contract were carefully considered by the parties. The meaning of several pertinent words in the written agreement is plain. As to the word "billing": In Bouvier's Law Dictionary, Vol. 1, pp. 344, 345, under the heading, "Bill", appears the following: "In Mercantile Law. The creditor's written statement of his claim, specifying the items." See, also, Funk & Wagnalls Practical

Standard Dictionary (1930), p. 128, and Webster's New International Dictionary, 2d Ed., p. 267. As to the term "service": In Bouvier's Law Dictionary, Vol. 3, p. 3048, appears the following: "Service. In Contracts. The being employed to serve another." The trial court rightfully concluded that the written contract was plain and complete in its terms, and that, therefore, the alleged custom or usage could not be read into it.

Defendants did not file a reply brief in this court, and waived oral argument. There is force in plaintiff's contention that the defense of custom or usage was a mere afterthought.

We find no real merit in this appeal, and the summary judgment of the County court of Cook county is affirmed.

SUMMARY JUDGMENT AFFIRMED.

Schwartz, P. J., and Friend, J., concur.

Abstract

A 2038

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A.D. 1951

General No. 9727 Agenda No. 5

RAYMOND BROWN and LESLIE ORCUTT, Plaintiffs-Appellants, vs. CHARLES L. GILL and CAROL V. GILL, Defendants-Appellees,	Appeal from Circuit Court of Sangamon County

343 I.A. 460

O'Connor, P.J.

Plaintiffs-appellants, Brown and Orcutt, a partnership, hereinafter called plaintiffs, entered into a written contract with defendants-appellees, hereinafter referred to as defendants, to build the latter a house in Ball Township, Sangamon County, Illinois. The house was constructed and both parties went to the Franklin Life Insurance Company in Springfield, where defendants had a loan application on file. Here plaintiffs, by Brown, signed a waiver of mechanics' lien, and also signed an affidavit that the amounts set forth in the waiver constituted the full amounts of their claims on account of such services, labor or materials furnished. Thereupon the Franklin Life Insurance Company issued its check in the sum of $5,073.57 in full payment of all sums due plaintiffs, payable to both parties. Defendants endorsed the check and turned it over to the plaintiffs. Plaintiffs then brought this suit for breach of contract, alleging that the sum of $5,540.38 was still due them. After answer by the defendants setting up the waiver of lien and affidavit, and certain other pleadings, judgment on the pleadings was entered by the trial court, from which judgment this appeal is prosecuted.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A.D. 1971

General No. 7707 Order No. 3

RAYMOND WOODS and DORIS DOUGLAS, Plaintiff-Appellants, vs. CHARLES E. OTTO and CAROL E. OTTO, Defendant-Appellees.	Appeal from Circuit Court of Bureau County

O'Connor, P.J.

Plaintiffs-appellants, Ross and Doris, a partnership, hereinafter called plaintiffs, entered into a written contract with defendants-appellees, hereinafter referred to as defendants, to build the latter a house in Hall Township, Bureau County, Illinois. The house was constructed and both parties went to the Franklin Life Insurance Company in Springfield, where defendants had a loan application on file. Here plaintiffs, by Doris, signed a waiver of mechanics' lien, and also signed an affidavit that the amounts set forth in the waiver constituted the full amounts of their claims on account of such services, labor or materials furnished. Thereupon the Franklin Life Insurance Company issued its check in the sum of $3,213.37 in full payment of all sums due plaintiffs, payable to both parties. Defendants endorsed the check and turned it over to the plaintiffs. Plaintiffs then brought this suit for breach of contract, alleging that the sum of $2,240.32 was still due them. After waiver by the defendants asserting as the waiver of lien and affidavit, and certain other pleadings, judgment on the pleadings was entered by the trial court, from which judgment this appeal is prosecuted.

The law applicable to a motion for judgment on the pleadings is well settled.

The motion is in the nature of a general demurrer and admits the truth of all well pleaded facts in the pleading of the opposite party. Being in the nature of a demurrer, such a motion raises an issue of law only. The real question to be determined is the sufficiency of the admitted facts to warrant the judgment rendered, and the materiality of those admitted facts upon which issue is joined. The motion cannot be sustained except where, under the conceded facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced. 41 Am. Jur., Pleading, Secs. 335-336.

The common law concept has been embodied in Sec. 45 (1) of the Civil Practice Act of Illinois (Ch. 110, Sec. 1691 Ill. Rev. Stats. 1949), Burrell, "The Use of Motions as a Method of Discovering Facts and Narrowing Issues", 1 University of Illinois Law Forum (1950) 56. The question is thus squarely presented as to whether the pleadings were sufficient, as a matter of law, to entitle the defendants to judgment thereon. Milanko v. Jensen, 404 Ill. 261, 265.

The complaint alleged, and the answer admitted, the execution on March 24, 1948, of the written contract to build the house, and the several agreements of the defendants and the plaintiffs contained in the contract.

It appears from the record that the contract was the usual time, labor and materials, plus commission, contract, for the construction of the defendants' house. The complaint continued by alleging that the plaintiffs performed all the conditions of the agreement by them to be performed, and the answer admitted this allegation. The defendants, however, denied the allegation of Paragraph 5 of the complaint that the defendants had failed

The law applicable to a motion for judgment on the pleadings is well settled.

The motion is in the nature of a general demurrer and admits the truth of all well pleaded facts in the pleading of the opposite party. Being in the nature of a demurrer, such a motion raises an issue of law only. The real question to be determined is the sufficiency of the admitted facts to warrant the judgment rendered, and the substantiality of those admitted facts upon which issue is joined. The motion cannot be considered merely upon the conceded facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced. 41 Am. Jur., Pleading, Sec. 332-334.

The common law concept has been embodied in Sec. 15 (1) of the Civil Practice Act of Illinois (Ch. 110, Sec. 15(1) Ill. Rev. Stats. 1963), thereof. "The Use of Motions as a Method of Disposing Facts and Assuming Issues", 3 University of Illinois Law Forum (1970) 36. The question in this square ly presented as to whether the pleadings were sufficient, as a matter of law, to entitle the defendants to judgment therein. Kilgore v. Jensen, 104 Ill. App. 2d, 367.

The complaint alleged, and the answer admitted, the execution on March 24, 1966, of the written contract to build the house, and the several agreements of the defendants and the plaintiffs contained in the contract.

It appears from the record that the contract was for usual time, labor and materials, plus commission, contract, for the construction of the defendants' house. The complaint continued by alleging that the plaintiffs performed all the conditions of the agreement by them to be performed, and the answer admitted this allegation. The defendants, however, denied the allegation of Paragraph 5 of the complaint that the defendants had failed

and neglected to perform their part of the said agreement by refusing to pay the balance plaintiffs alleged to be due, in the sum of $5,540.38. Defendants also denied that they were ever requested to pay that sum and affirmatively set forth in their answer the execution by plaintiffs of a waiver of liens and affidavits, on November 23, 1948, as follows:

"THE FRANKLIN LIFE INSURANCE COMPANY
Springfield, Illinois

Part I - Waiver of Liens

We, the undersigned, are general or subcontractors, materialmen, or other persons furnishing services or labor or materials, as indicated under our respective signatures below, in the construction or repair of improvements upon real estate owned by Charles Lewis Gill and described as follows:

Complete Waiver to Show Description of Property Before Same is Executed by Any Party	Tract B-6, Section Three, Oak Lane Area, Lake Springfield, in Ball Township, Sangamon County, Illinois

In consideration of the sum of $1.00 to each of us in hand paid, receipt whereof is hereby acknowledged, and other good and valuable considerations, we do hereby waive, release and quit claim any and all lien or claim or right of lien on said above described building and premises under "An Act to Revise the law in relation to Mechanics' Liens approved May 18, 1903," and in force July 1, 1903, and all the lien laws of the State of Illinois, or any amendments thereof, on account of labor or materials, or both, furnished or which may be furnished by the undersigned to or on account of the said Charles Lewis Gill for said building or premises; and we do further warrant that we have not and will not assign our claims for payment, nor our right to perfect a lien against said property, and that we have the right to execute this waiver and release thereof.

and neglected to perform their part of the said agreement by refusing to pay the balance plaintiffs alleged to be due, in the sum of $3,340.32. Defendants also denied that they were ever requested to pay that sum and affirmatively set forth in their answer the execution by plaintiffs of a waiver of liens and affidavits, on November 23, 1918, as follows:

"THE PRUDENTIAL LIFE INSURANCE COMPANY
Springfield, Illinois

Part I - Waiver of Liens

We, the undersigned, are general or subcontractors, materialmen, or other persons furnishing services or labor or materials, as indicated under our respective signatures below, in the construction or repair of improvements upon real estate owned by Charles Lewis Gill and described as follows:

Complete Waiver to Show Description of Property Before Same is Recorded by Any Party	Tract 8-6, Section Three, Oak Lawn Area, Lake Springfield, in Ball Township, Sangamon County, Illinois

In consideration of the sum of $1.00 to each of us in hand paid, receipt whereof is hereby acknowledged, and other good and valuable considerations, we do hereby waive, release and quit claim any and all lien or claim or right of lien on said above described building and premises under the act to Revise the law in relation to Mechanics' Liens approved May 18, 1903," and in force July 1, 1903, and all the lien laws of the State of Illinois, or any amendments thereof, on account of labor or materials, or both, furnished or which may be furnished by the undersigned to or on account of the said Charles Lewis Gill for said building or premises; and we do further warrant that we have not and will not assign our claims for payment, nor our right to perfect a lien against said property, and that we have the right to execute this waiver and release thereof.

ALL of the subscribers to this instrument respectively warrant that all laborers employed by them upon the aforesaid premises have been fully paid and that none of such laborers have any claim, demand, or lien against said premises; and further, that no chattel mortgage, conditional bill of sale or retention of title agreement has been given or executed by the said owner or any general contractor or other party or any of us, for or in connection with any material, appliances, machinery, fixtures, or furnishings placed upon or installed in the aforesaid premises by any of us, other than: . . . . . .

It is understood and agreed that any and all signatures hereto are for all services rendered, work done and material furnished heretofore and hereafter by the signers in any and all capacities, and are not understood to be only for the particular item against which the signature is affixed.

Witness the following signatures and seals 23rd day of November, 1948."

The affidavit signed by Raymond C. Brown in behalf of the plaintiffs was as follows:

"Part II - Affidavit of General Contractor

State of Illinois)
) SS.
County of Sangamon)

I, Raymond C. Brown, of the firm of Brown & Orcutt, having been first duly sworn, depose and say: That the persons, firms and corporations who have executed the waiver of liens on the reverse side hereof are all of the persons, firms and corporations who have furnished services, labor or materials in the construction or repair of improvements on the real estate described in said waiver and that the amounts set opposite their signatures constitute the full amounts of their claims on account of such services,

All of the subscribers to this instrument respectively express that all laborers employed by them upon the aforesaid premises have been fully paid and that none of such laborers have any claim, demand, or lien against said premises; and further, that no chattel mortgage, conditional bill of sale or retention of title agreement has been given or executed by the said owner or any general contractor or other party or and of us, for or in connection with any material, appliances, machinery, fixtures, or furnishings placed upon or installed in the aforesaid premises by one of us, other than . . . . . .

It is understood and agreed that any and all statements herein are for all services rendered, work done and material furnished hereinbefore and hereafter by the signers in any and all capacities, and are not understood to be only for the particular item against which the signature is affixed.

Witness the following signatures and seals 23rd day of December, 1940."

The affidavit signed by Raymond C. Brown in behalf of the plaintiffs was as follows:

"Part II - Affidavit of General Contractor

State of Illinois)
) ss.
County of Sangamon)

I, Raymond C. Brown, of the City of Springfield, having been first duly sworn, depose and say: That the persons, firms and corporations who have executed the waiver of liens on the reverse side hereof are all of the persons, firms and corporations who have furnished services, labor or material in the construction or repair of improvements on the real estate described in said waiver and that the amounts set opposite their signatures constitute the full amounts of their claims on account of such services,

labor or materials furnished, and that, as of the date of this affidavit, such work has been fully completed and accepted by the owner of said real estate.

Brown & Crcutt Builders

Raymond C. Brown

RFD #, Springfield, Ill. General Contractor.

Subscribed and sworn to before the undersigned, a Notary Public in and for said County of Sangamon, State of Illinois, at Springfield, Ill., this 23rd day of November, 1948.

(SIGNED)

My Commission Expires August 6, 1952 (SEAL)"

Stanley C. Howard Notary Public."

The affidavit signed by one defendant, Charles Lewis Gill, was as follows:

"Part III - Affidavit of Owner

State of Illinois)
) SS.
County of Sangamon)

I, Charles Lewis Gill, having been first duly sworn, depose and say: That the persons, firms and corporations who have executed the waiver of liens on the reverse side hereof, with the amount of their claims shown opposite their signatures, constitute all of the persons, firms and corporations who have furnished services, labor or materials in the construction or repair of improvements on real estate described in said waiver, and that, as of the date of this affidavit, such construction or repair of improvements has been fully completed and accepted by me; that the general contractor, if any, and all other parties who have furnished such services,

labor or materials furnished, and that, as of the date of this affidavit, such work has been fully completed and accepted by the owner of said real estate.

Frank A Crosby Building

Signed C. Frank

ATTO &, Springfield, Ill. General Contractor.

Subscribed and sworn to before me this seventh day, a Notary Public in and for said County of Sangamon, State of Illinois, at Springfield, Ill., this 22nd day of November, 1941.

(SEAL)

My Commission Expires Stanley C. Howard

August 6, 1952 Notary Public."

(SEAL)"

The affidavit signed by one defendant, Charles Louis Gill, was as follows:

"Part III - Affidavit of Owner

State of Illinois)
) ss.
County of Sangamon)

I, Charles Louis Gill, having been first duly sworn, deposes and says: That the persons, firms and corporations who have furnished the waiver of liens on the reverse side hereof, with the amount of their claims shown opposite their signatures, constitute all of the persons, firms and corporations who have furnished services, labor or materials in the construction or repair of improvements on real estate described in said waiver, and that, as of the date of this affidavit, such construction or repair of improvements has been fully completed and accepted by me; that the general contractor, if any, and all other parties who have furnished such services,

labor or materials have been paid in full; that, when said parties were paid in full, I had no notice of any claim of any subcontractor, laborer or materialman; and that I do not now have notice of any claim of any subcontractor, laborer or materialman.

(SIGNED) Charles Lewis Gill

Owner.

Subscribed and sworn to before the undersigned, a Notary Public in and for said County of Sangamon, State of Illinois, at Springfield, Ill., this 23rd day of November, 1948.

(SEAL) Stanley G. Howard,

My Commission Expires Notary Public.

August 6, 1952 "

A bill of particulars was then filed by the plaintiffs, the last date showing work done by them as November 13, 1948. Thereupon the plaintiffs filed a replication, which was answered by the defendants. The defendants moved for judgment on the pleadings, but the court's decision on that motion was withheld pending the filing and determination of further pleas, for which leave to file was given.

In the amendment to the replication the plaintiffs stated as follows:

"1. The plaintiffs admit that Raymond C. Brown signed the Affidavit set out in paragraph five of said Answer herein, but state the fact to be that at the time of the execution thereof, the defendants well knew and it was agreed by them and the said plaintiffs herein that the same was made for the purpose of enabling the said defendants to procure a loan from The Franklin Life Insurance Company in the sum of five thousand seventy-three dollars and fifty-seven cents ($5,073.57) and it was specifically

labor or materials have been paid in full; that, when said petition were paid in full, I had no notice of any claim of any subcontractor, laborer or materialman; and that I do not now have notice of any claim of any subcontractor, laborer or materialman.

(SEAL) Charles Louis Gill

Owner.

Subscribed and sworn to before the undersigned, a Notary Public in and for said County of Sangamon, State of Illinois, at Springfield, Ill., this 23rd day of November, 1941.

(SEAL) Stanley G. Howard,

My Commission Expires Notary Public.

August 6, 1952 "

A bill of particulars was then filed by the plaintiff, the last date showing work done by them as November 11, 1941. Thereupon the plaintiff filed a replication, which was answered by the defendants. The defendants moved for judgment on the pleadings, but the court's decision on that motion was withheld pending the filing and determination of further pleas, for which leave to file was given.

In the amendment to the replication the plaintiffs stated as follows:

"1. The plaintiffs state that Edward G. Howe signed the affidavit set out in paragraph five of said answer herein, but state the fact to be that at the time of the execution thereof, the defendants well knew and it was agreed by them and the said plaintiffs herein, that the same was made for the purpose of enabling the said defendants to procure a loan from The Franklin Life Insurance Company in the sum of five thousand seventy-three dollars and fifty-seven cents ($5,073.57) and it was specifically

agreed that the claim of the said Franklin Life Insurance Company should be a first and prior lien to that of the said plaintiffs; that the said defendants well knew and understood that they were still liable to pay to the said plaintiffs, a balance in favor of the said plaintiffs determined to be five thousand five hundred forty-seven dollars and seventy cents ($5,547.70)."

The defendants then moved to strike the amendment to the replication and for judgment on the pleadings, on the theory that the pleadings thus constituted show on their face an account stated between the parties thereto, payment by defendants to plaintiffs of $5,073.57, and no allegation that said affidavit, which amounts to an account stated, was procured by fraud, duress or mistake.

The plaintiffs made a counter-motion for judgment on the pleadings, and the court thereupon entered the following order, from which this appeal was taken:

"Court allows motion by defendants for judgment on the pleadings. Court finds there was an accord and satisfaction between the parties. Court denies motion by plaintiffs for judgment on the pleadings. It is adjudged by the Court that the plaintiffs take nothing by their suit and that the action be barred and that the defendants go hence without day, and that the plaintiffs pay the costs and that execution issue therefor".

The defendants' motion for judgment on the pleadings, therefore, was based on account stated. The judgment order of the trial court, however, proceeded on the theory that plainfiffs were barred by an accord and satisfaction. Defendants do not seek to sustain the court's theory, but assert that a judgment

agreed that the claim of the said Franklin Life Insurance Company should be a first and prior lien to that of the said plaintiffs; that the said defendants well knew and understood that they were still liable to pay to the said plaintiffs, a balance in favor of the said plaintiffs determined to be five thousand five hundred forty-seven dollars and seventy cents ($5,547.70)."

The defendants then moved to strike the exceptions to the resolution and for judgment on the pleadings, on the theory that the pleadings thus constituted show on their face an account stated between the parties thereto, payment by defendants to plaintiffs of $5,547.57, and no allegation that said affidavit, which amounts to an account stated, was procured by fraud, duress or mistake.

The plaintiffs made a counter-motion for judgment on the pleadings, and the court thereupon entered the following order, from which this appeal was taken:

"Court allows motion by defendants for judgment on the pleadings. Court finds there was an account and satisfaction between the parties. Court denies motion by plaintiffs for judgment on the pleadings. It is adjudged by the Court that the plaintiffs take nothing by their suit and that the action be barred and that the defendants go hence without day, and that the plaintiffs pay the costs and that execution issue therefor".

The defendants' motion for judgment on the pleadings, therefore, was based on account stated. The judgment order of the trial court, however, proceeded on the theory that plaintiffs were barred by an account and satisfaction. Defendants do not want to sustain the court's theory, but assert that a judgment

representing a correct conclusion will be affirmed even though the stated reasoning or findings of law by the court may be subject to criticism. In this contention defendants are correct.

Assuming without deciding that the finding of the court as to an accord and satisfaction, was incorrect, if the judgment itself was correct, it will not be disturbed, for even though the finding and judgment were incorporated in the same instrument, they are separate and distinct, 30 Am. Jur., Judgments, Sec. 7; and if the judgment is correct it will not be overthrown because reached by reasoning which is false, 30 Am. Jur., Judgments, Sec. 9, n. 5, or because certain findings of law are erroneous. Ballance v. City of Peoria, 70 Ill. App. 546; Lidgerwood Mfg. Co. v. S.R.H.Robinson & Son Contracting Co., 198 Ill. App. 604.

The waiver and affidavits coupled with the payment procured by the defendants from a third party, the Franklin Life Insurance Company, was an account stated. The facts of the transaction are not only undisputed, they are admitted by both parties. In this state of the record, whether the transaction amounts to an account stated is a matter of law for the determination of the court. Pure Torpedo Corp. v. Nation, 327 Ill. App. 28. An "account stated" is an agreement between parties who have had previous transactions of a monetary character that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of that balance. Pure Torpedo Corp. v. Nation, supra; Century Indemnity Co. v. Board of Education of City of Chicago, 327 Ill. App. 216. The transaction in question not only encompassed an implied promise by defendants to plaintiffs to pay the sum stated in the account, but the payment was

representing a correct conclusion will be affirmed even though the stated reasons or findings of law by the court may be subject to criticism. In this connection decisions are correct.

Assuming without deciding that the finding of the court as to an amount due satisfaction, was incorrect, if the judgment should be correct, it will not be disturbed, for even assuming the finding and judgment were incorrect in the case instant, they are separate and distinct, 22 Am. Jur., Judgments, Sec. 21 and if the judgment is correct it will not be overturned because reached by reasoning which is false. 50 Am. Jur., Judgments, Sec. 2, p. 5, or because certain findings of law are erroneous. Building v. City of Peoria, 70 Ill. App. 246; Lakewood Ill. Co. v. E.L.C.Robinson & Son Contracting Co., 198 Ill. App. 604.

The waiver and affirmative receipt with the payment presented by the defendants from a third party, the Prudential Life Insurance Company, was an account stated. The facts of the transactions are not only undisputed, they are admitted by both parties. In this state of the record, charging the transaction account to be account stated is a matter of law for the determination of the court. Pure Foods Corp. v. Dutton, 327 Ill. App. 22. An "account stated" is an agreement between parties who have had previous transactions of a monetary character that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of that balance. Pure Foods Corp. v. Dutton, supra; Century Indemnity Co. v. Board of Education of City of Chicago, 327 Ill. App. 716. The transaction in question not only encompassed an implied promise by defendants to plaintiffs to pay the sum stated in the account, but the payment was

actually made. The minds of the parties not only met upon the account stated, Pure Torpedo Corp. v. Nation, supra, but the undisputed facts in the record are that defendant in reliance on the account stated caused the Franklin Life Insurance Company to pay a large sum of money to the plaintiffs. It is this transaction which plaintiffs now seek to set aside, on the basis of the "understanding" of the parties at the time the waiver and affidavit were executed.

The plaintiffs make no allegation that the waiver and affidavits should be set aside or corrected because of mistake, omission or fraud by defendants. These allegations, according to the general rule, are necessary to avoid the principle that an account stated is deemed conclusive at law and in equity unless impeached by such allegations. Pure Torpedo Corp. v. Nation, supra. Plaintiffs, instead, rely on their agreement that defendants would remain liable to pay the balance due them over and above the sums paid plaintiffs by the Franklin Life Insurance Company.

The understanding or agreement which plaintiffs seek to assert, to avoid the legal effect of the account stated between the parties, must have been oral because it is not set forth in plaintiffs' pleadings, as required by Sec. 36 of The Civil Practice Act, (Ch. 110, S. 160, Ill. Rev. Stat. 1949), in the case of writings.

We are thus confronted with the question of the right of plaintiffs to assert the oral understanding to vitiate the legal effect of the account stated, and conversely with the right of defendants to obtain a judgment on the pleadings in reliance upon the parol evidence rule.

It is unquestionably the rule that in the absence of ambiguity, fraud, or mistake, parol or extrinsic evidence is inadmissible to vary, add to, modify or contradict a written instrument by showing that the parties'

actually made. The claim of the parties not only but even the account stated, from Tornado Corp. v. Batten, supra, but the unsigned data in the record are that defendant in reliance on the account stated caused the Travelle Life Insurance Company to pay a large sum of money to the plaintiff. If to this transaction which plaintiff now seek to set aside, on the basis of the "misrepresentation" of the question of the time the policy had actually been executed.

The distributor gave no clarification thus the waiver and affidavits should be set aside or corrected because of mistake, omission or fraud by defendants. These allegations, according to the general rule, are necessary to avoid the principle that an account stated is deemed conclusive of law and in equity unless impeached by such allegations. Pure Corporate Corp. v. Batten, supra. Plaintiffs, instead, rely on their argument that defendants would remain liable to pay the balance due them even had above the sum paid plaintiffs by the Travelle Life Insurance Company.

The contention or agreement which plaintiff seek to assert, to avoid the legal effect of the account stated between the parties, must have been oral because it is not set forth in plaintiffs' pleadings, as required by Rule 24 of the Civil Practice Act, (Ill. Rev. Stat. 1957, Chap. 110, Par. 24), in the form of writing.

We are then confronted with the question of the right of plaintiffs to assert the oral understanding to vitiate the legal effect of the account stated, and accordingly with the right of defendants to obtain a judgment on the pleadings in reliance upon the legal evidence rule.

It is universally the rule that in the absence of mutuality, fraud, or mistake, parol or extrinsic evidence is inadmissible to vary, add to, modify or contradict a written instrument by showing that the parties'

intention or their real agreement was different from that expressed in the writing. Bixler v. Brim, 206 Ill. App. 294; North Ave. State Bank v. Nichols, 252 Ill. App. 366. Neither ambiguity, fraud, or mistake are alleged in the case at bar. The rule is of long standing. Broadwell for Use of Thompson v. Broadwell, 6 Ill. 599. In Illinois it is not a rule of evidence but one of substantive law. Berkshire Life Ins. Co. v. Jackson Realty & Management Corp., 328 Ill. App. 318. It applies in the case at bar.

The plaintiffs, under the pleadings, admitted the execution of the waiver of lien and affidavits constituting the account stated, but alleged an oral agreement or understanding to vary the written account stated. This allegation contained no statement by way of defense under which evidence of the oral agreement or understanding could properly be admitted, because such evidence would have been in violation of the parol evidence rule. In view of this, judgment was properly entered against them on the pleadings. O'Brien v. O'Brien, 362 Pa. 66, 66 A. 309; White v. Oliver, 49 P. (2d) 147 (Okla.); see also Anno. 10 A.L.R. (2d) 720.

A judgment different from that rendered could not have been entered on the pleadings in the record, as no evidence could have been adduced to prove the oral agreement to vitiate the written account stated.

For the reasons above set forth the judgment of the Circuit Court of Sangamon County is affirmed.

Affirmed.

intention or their real agreement was different from that expressed in the writing. Binder v. Alois, 209 III. App. 274; Brown Bros. Plumb Comp v. Hatfield, 252 Ill. App. 326. Neither ambiguity, fraud, or mistake are allowed in the case at bar. The rule is of long standing. Blackwood Jos Co of Chicago v. Lundquist, 6 Ill. App. 394. In Illinois it is not a rule of evidence but one of substantive law. Hawkinson Lab Inc. Co. v. Western Reality & Insurance Corp., 324 Ill. App. 324. It applies in the case at bar.

The plaintiffs, under the pleadings, obtained the exclusion of the waiver of Zlan and attorneys constituting the account stated, but allowed in oral agreement or understanding to vary the written account stated. This allegation constituted an attempt by way of defense under parol evidence of the oral agreement or understanding could properly be admitted, because such evidence would have been in violation of the parol evidence rule. In view of this, judgment was properly entered against them on the pleadings. Nelson v. Dunham, 252 Ill. 60, 64 A. 370; Mills v. Hawker, 49 N. (2d) 147 (Ind.); see also Kane, 10 L.R.A. (2d) 710.

A judgment different from that rendered could not have been entered on the pleadings in the instant, as no evidence could have been adduced to prove the oral agreement to vitiate the written account stated.

For the reasons above set forth the judgment of the Circuit Court of Sangamon County is affirmed.

Affirmed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A. D. 1951

3043

General No. 9734.

Agenda No. 6.

343 I.A. 461

HARLAN J. JOST, Plaintiff-Appellant, -vs- LUTHER VERNON LEWIS and LOUISE LEWIS, Defendants-Appellees.	)	Appeal from Circuit Court of Tazewell County.

DADY, J.

This is a proceeding brought by appellant, Harlan J. Jost, hereinafter designated as plaintiff, against Luther Vernon Lewis and Louise Lewis, his wife, asking that a deed, conveying to defendants real estate in Pekin, Illinois, be declared to be a mortgage.

No question is raised as to the sufficiency of the pleadings.

The cause was referred to a Master in Chancery who found that the plaintiff had failed to prove his case by a "preponderance of clear, satisfactory and convincing evidence" and recommended that the complaint be dismissed for want of equity. Such report was approved by the chancellor and a decree was entered dismissing the complaint for want of equity. From that decree plaintiff appeals.

Inasmuch as Louise Lewis, who was the wife of Luther Vernon Lewis, did not take any material part in the transaction in question, we will in this opinion refer to Luther Vernon Lewis as the "defendant."

The Master also found that "From the evidence in the record and from the inferences to be drawn therefrom it can and must be

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A. D. 1951

General No. 2724. Agenda No. 6.

HARLAN J. LOST, Plaintiff-Appellant, -vs- LUTHER VERNON LEWIS and LOUISE LEWIS, Defendants-Appellees.	Appeal from Circuit Court of Tazewell County.

DADY, J.

This is a proceeding brought by appellant, Harlan J. Lost, hereinafter designated as plaintiff, against Luther Vernon Lewis and Louise Lewis, his wife, seeking that a deed, conveying to defendants real estate in Pekin, Illinois, be declared to be a mortgage.

No question is raised as to the sufficiency of the pleadings.

The cause was referred to a Master in Chancery who found that the plaintiff had failed to prove his case by a "preponderance of clear, satisfactory and convincing evidence" and recommended that the complaint be dismissed for want of equity. Such report was approved by the chancellor and a decree was entered dismissing the complaint for want of equity. From that decree plaintiff appeals.

Inasmuch as Louise Lewis, who was the wife of Luther Vernon Lewis, did not take any material part in the transaction in question, we will in this opinion refer to Luther Vernon Lewis as the "defendant."

The Master also found that "From the evidence in the record and from the inferences to be drawn therefrom it can and must be

reasonably found that the plaintiff, *** following the institution of said Peoria litigation, decided to either convey or encumber all of his transferable real and personal property for the purpose of avoiding either an attachment or a levy on the same in the event that the outcome of the Peoria litigation should result unfavorably to the said plaintiff." Although the decree approved the report it made no specific finding on such question.

Inasmuch as such question is not directly raised by the pleadings, and inasmuch as such question is not discussed in the briefs or arguments before us, we believe the case can properly be disposed of by us without our discussing such question.

Plaintiff and defendant were in 1946 and for a number of years prior thereto had been very friendly and did a good deal of business together. The premises in question had been owned by plaintiff since 1937 and were improved with a building, on the first floor of which was a garage occupied by defendant, who operated a Pontiac automobile agency therein. There were four apartments in the upper portion of the building, two or three of which were furnished and all of which were rented. Plaintiff had been for a number of years in the contracting business.

At no time prior to April of 1946 was there any written lease between plaintiff and defendant. Defendant's tenancy was based upon an oral understanding between the parties. The property on April 26, 1946, was encumbered with an $8,000.00 lien, evidenced by a trust deed, which was owned by Anna E. MacDonald, plaintiff's mother-in-law.

Prior to April, 1946, plaintiff had entered into a contract with a third party to erect a building in Peoria, Illinois, and had put certain moneys into that construction beyond the amount which

reasonably found that the plaintiff, *** following the institution of said Peoria litigation, decided to either convey or encumber all of his transferable real and personal property for the purpose of avoiding either an attachment or a levy on the same in the event that the outcome of the Peoria litigation should result unfavorably to the said plaintiff." Although the decree approved the report it made no specific finding on such question.

Inasmuch as such question is not directly raised by the pleadings, and inasmuch as such question is not discussed in the briefs or arguments before us, we believe the case can properly be disposed of by us without our discussing such question.

Plaintiff and defendant were in 1940 and for a number of years prior thereto had been very friendly and did a good deal of business together. The premises in question had been owned by plaintiff since 1927 and were improved with a building, on the first floor of which was a garage occupied by defendant, who operated a Pontiac automobile agency therein. There were four apartments in the upper portion of the building, two or three of which were furnished and all of which were rented. Plaintiff had been for a number of years in the contracting business.

At no time prior to April of 1946 was there any written lease between plaintiff and defendant. Defendant's tenancy was based upon an oral understanding between the parties. The property on April 26, 1946, was encumbered with an $8,000.00 lien, evidenced by a trust deed, which was owned by Anna E. MacDonald, plaintiff's mother-in-law.

Prior to April, 1946, plaintiff had entered into a contract with a third party to erect a building in Peoria, Illinois, and had put certain moneys into that construction beyond the amount which

he received from the owners. It is undisputed that litigation had been commenced concerning the terms of that contract. As a result of this difficulty, in April, 1946, plaintiff was subjected to substantial financial peril and was in need of money.

On April 26, 1946, plaintiff and his wife conveyed the premises in question to the defendant and his wife, as joint tenants, by warranty deed. This deed was drafted in the office of one of the attorneys appearing for the defendant in the present proceeding. At the same time defendant and his wife executed a note and trust deed upon the premises in the amount of $12,000.00 as a result of which one E. W. Aufderheide delivered $12,000.00 to the defendant who in turn delivered it to the plaintiff. This was the only consideration received by plaintiff for the deed in question. At the time he advanced the $12,000.00 Aufderheide was told that Mrs. MacDonald would subordinate her lien to the lien given Aufderheide.

On the evening of this transaction, plaintiff and defendant drove to Madison, Wisconsin, where they met with Mrs. MacDonald the next morning, and there obtained from her a release of her lien.

On the same date the defendant and his wife made and executed an $8,000.00 note and a trust deed dated April 26, 1946, upon said premises to secure the payment of $8,000.00 which was subordinate to the $12,000.00 trust deed above referred to. These were delivered to Mrs. MacDonald. About a month later Aufderheide was paid his $12,000.00 by defendants, who executed a new note and trust deed on the premises in such sum to the American National Bank of Pekin. At the same time the defendants executed a new $8,000.00 trust deed on the premises, which was given to Mrs. MacDonald in lieu of the $8,000.00 trust deed dated April 26, 1946.

he received from the owners. It is undisputed that litigation had been commenced concerning the terms of that contract. As a result of this difficulty, in April, 1946, plaintiff was subjected to substantial financial peril and was in need of money.

On April 26, 1946, plaintiff and his wife conveyed the premises in question to the defendant and his wife, as joint tenants, by warranty deed. This deed was drafted in the office of one of the attorneys appearing for the defendant in the present proceeding. At the same time defendant and his wife executed a note and trust deed upon the premises in the amount of $12,000.00 as a result of which one H. W. Auderhaide delivered $12,000.00 to the defendant who in turn delivered it to the plaintiff. This was the only consideration received by plaintiff for the deed in question. At the time he advanced the $12,000.00 Auderhaide was told that Mrs. Macdonald would subordinate her lien to the lien given Auderhaide.

On the evening of this transaction, plaintiff and defendant drove to Madison, Wisconsin, where they met with Mrs. Macdonald the next morning, and there obtained from her a release of her lien.

On the same date the defendant and his wife made and executed an $8,000.00 note and a trust deed dated April 26, 1946, upon said premises to secure the payment of $8,000.00 which was subordinate to the $12,000.00 trust deed above referred to. These were delivered to Mrs. Macdonald. About a month later Auderhaide was paid his $12,000.00 by defendants, who executed a new note and trust deed on the premises in such sum to the American National Bank of Pekin. At the same time the defendants executed a new $8,000.00 trust deed on the premises, which was given to Mrs. Macdonald in lieu of the $8,000.00 trust deed dated April 26, 1946.

In May of 1948 the defendants executed and delivered a new mortgage of $21,900.00 to the American National Bank of Pekin on the property and its $12,000.00 lien was then satisfied. The then existing $8,000.00 Trust Deed was also satisfied and a new Trust Deed in the sum of $8,000.00, subordinate to the $21,900.00 lien, was placed against the premises and given to Mrs. MacDonald.

In 1948 defendant purchased an adjoining lot and upon it he constructed a building which was attached to and made a part of the building located on the premises claimed by plaintiff. About one foot of the new building extended onto the land claimed by plaintiff.

Plaintiff testified that the building, which he claims to own, cost him about $29,000.00 to construct, excluding the contractor's usual profit of 10 per cent; that a few days prior to April 26, 1946, he sought to obtain a $25,000.00 loan on the property from the Pekin Mutual Building and Loan and also from the Herget Bank; that about this time he borrowed money from numerous people and upon his life insurance policy, that he borrowed $3,600.00 from Knud Svendsen and gave him a bill of sale upon contractor's equipment as security, that he borrowed $1,500.00 from Ted Ehrett and gave him the title to two trucks as security, that he borrowed $1,000.00 from Al Jost, his brother, and deeded him two lots as security, and that he told his friend, defendant, of his difficulty, and defendant stated that he could help plaintiff and knew of a party named Aufderheide from whom he could get the money right away if the building was put in his, the defendant's name, and if Mrs. MacDonald would take a second mortgage for the $8,000.00 owed to her.

Plaintiff also testified that he and defendant then went to see another attorney who told them that he wouldn't be able to fix

In May of 1948 the defendants executed and delivered a new mortgage of $21,000.00 to the American National Bank of Pekin on the property and its $12,000.00 lien was then satisfied. The then existing $8,000.00 Trust Deed was also satisfied and a new Trust Deed in the sum of $8,000.00 subordinate to the $21,900.00 lien, was placed against the premises and given to Mrs. MacDonald.

In 1948 defendant purchased an adjoining lot and upon it he constructed a building which was attached to and made a part of the building located on the premises claimed by plaintiff. About one foot of the new building extended onto the land claimed by plaintiff.

Plaintiff testified that the building, which he claims to own, cost him about $29,000.00 to construct, excluding the contractor's usual profit of 10 per cent; that a few days prior to April 26, 1948, he sought to obtain a $25,000.00 loan on the property from the Pekin Mutual Building and Loan and also from the Berget Bank; that about this time he borrowed money from numerous people and upon his life insurance policy, that he borrowed $3800.00 from Knud Svendsen and gave him a bill of sale upon contractor's equipment as security, that he borrowed $1500.00 from Ted Barrett and gave him the title to two trucks as security, that he borrowed $1,000.00 from Al Joat, his brother, and deeded him two lots as security, and that he told his friend, defendant, of his difficulty, and defendant stated that he could help plaintiff and knew of a party named Auderhaide from whom he could get the money right away if the building was put in his, the defendant's name, and if Mrs. MacDonald would take a second mortgage for the $8,000.00 owed to her.

Plaintiff also testified that he and defendant then went to see another attorney who told them that he wouldn't be able to fix

any papers up that afternoon because he had to be in court, that such attorney stated that a deed would be the quickest way to handle the transaction but he wanted to make sure that plaintiff would get the building back, that at that time defendant told such attorney that there had never been any trouble between the parties and the attorney replied that it would be all right for plaintiff to do it as suggested, if he knew he was going to get his building back.

Plaintiff testified that thereafter, but on the same day, the parties went to Aufderheide's office and defendant talked to him along the line that the money was needed quickly and that Mrs. MacDonald would take a second mortgage for her $8,000.00, that later that afternoon defendant called and told plaintiff that Aufderheide informed him it would be all right and that plaintiff and defendant should get their wives and meet at the office of one of the counsel now representing defendant, that the parties met outside of such office and defendant informed them not to say anything inside, but just to sign the papers, that the papers were then signed and plaintiff and defendant left for Madison, Wisconsin, arriving there the next morning, that at Madison they saw Mrs. MacDonald and told her that defendant had to raise some money quickly because of a job in Peoria, and that defendant was able to get the money by taking title to the building temporarily, that it was then explained to Mrs. MacDonald that if she would subordinate her mortgage to the $12,000.00 mortgage, she would get her interest check from defendant, and that the building would still belong to plaintiff, and that Mrs. MacDonald then agreed to this procedure and signed some papers, which the parties brought back to Pekin.

any papers up that afternoon because he had to be in court, that such attorney stated that a deed would be the quickest way to handle the transaction but he wanted to make sure that plaintiff would get the building back, that at that time defendant told such attorney that there had never been any trouble between the parties and the attorney replied that it would be all right for plaintiff to do it as suggested, if he knew he was going to get his building back.

Plaintiff testified that thereafter, but on the same day, the parties went to Auderhaide's office and defendant talked to him along the line that the money was needed quickly and that Mrs. MacDonald would take a second mortgage for her $8,000.00, that later that afternoon defendant called and told plaintiff that Auderhaide informed him it would be all right and that plaintiff and defendant should get their wives and meet at the office of one of the counsel now representing defendant, that the parties met outside of such office and defendant informed them not to say anything inside, but just to sign the papers, that the papers were then signed and plaintiff and defendant left for Madison, Wisconsin, arriving there the next morning, that at Madison they saw Mrs. MacDonald and told her that defendant had to raise some money quickly because of a job in Peoria, and that defendant was able to get the money by taking title to the building temporarily, that it was then explained to Mrs. MacDonald that if she would subordinate her mortgage to the $12,000.00 mortgage, she would get her interest check from defendant, and that the building would still belong to plaintiff, and that Mrs. MacDonald then agreed to this procedure and signed some papers, which the parties brought back to Peoria.

Plaintiff further testified that defendant said this arrangement would benefit defendant because he would have a better financial statement to show the Pontiac Motor Company and that the Pontiac Motor Company had from time to time been objecting to defendant's financial condition, that on the way back from Madison defendant told plaintiff that Aufderheide wanted the income from the building applied on the mortgage and plaintiff agreed to that procedure, that plaintiff and defendant on the way back stopped in Peoria and saw an insurance agent, and told him that the building had been temporarily transferred and the insurance should be placed in the name of defendant and to increase the insurance, that they also told the insurance agent to credit the old policy to the new one, because, if all of the insurance were new, additional money would be required to pay for the new policy and there was no money in the building fund. Plaintiff testified that he never received any money from the insurance agent or any one else on the insurance existing on the building on the date of the deed, and that the additional insurance was to be paid for by defendant out of the rental income.

Subsequent to April 26, 1946, plaintiff put a driveway and sidewalk on the east side of the building and a sidewalk on the south side thereof, which cost him $576.94. He testified that he never billed defendant for this work and does not claim that defendant is indebted to him for it, because it was an improvement to his, the plaintiff's, property, that in the fall of 1948, plaintiff learned for the first time that defendant contended defendant was the owner of the building, that on November 4, 1948, he made a demand upon defendant to reconvey the building with a tender to pay to defendant everything which he had coming, but that defendant then stated he

Plaintiff further testified that defendant said this arrangement would benefit defendant because he would have a better financial statement to show the Pontiac Motor Company and that the Pontiac Motor Company had from time to time been objecting to defendant's financial condition, that on the way back from Madison defendant told plaintiff that Autdermatic wanted the income from the building applied on the mortgage and plaintiff agreed to that procedure, that plaintiff and defendant on the way back stopped in Peoria and saw an insurance agent, and told him that the building had been temporarily transferred and the insurance should be placed in the name of defendant and to increase the insurance, that they also told the insurance agent to credit the old policy to the new one, because, if all of the insurance were new, additional money would be required to pay for the new policy and there was no money in the building fund. Plaintiff testified that he never received any money from the insurance agent or any one else on the insurance existing on the building on the date of the deed, and that the additional insurance was to be paid for by defendant out of the rental income.

Subsequent to April 26, 1946, plaintiff put a driveway and sidewalk on the east side of the building and a sidewalk on the south side thereof, which cost him $576.94. He testified that he never billed defendant for this work and does not claim that defendant is indebted to him for it, because it was an improvement to his, the plaintiff's, property, that in the fall of 1948, plaintiff learned for the first time that defendant contended defendant was the owner of the building, that on November 4, 1948, he made a demand upon defendant to reconvey the building with a tender to pay to defendant everything which he had coming, but that defendant then stated he

bought the building and that it was based on a document prepared by one A. O. Smith.

This document was introduced in evidence and purported to be a lease between plaintiff, as lessor, and defendant, as lessee, dated July 1, 1945, providing for a rental of $75.00 per month until January 1, 1946, and $125.00 per month thereafter until July 1, 1955, and contained an option for defendant to purchase the property on or before July 1, 1946, together with the furnishings for $20,000.00 Plaintiff testified that this instrument was prepared at the request of defendant who stated that Aufderheide wanted that done, that it was done approximately two or three weeks after April 26, 1946, that he did not read the instrument, but merely signed it and did not ever have any copy thereof, and that he did not see a copy until the day he testified. Plaintiff further testified that the written lease did not in any way express any agreement existing between himself and defendant.

Plaintiff in his litigation on the construction contract testified that he had sold this building to defendant in order to get some money to finish that job.

After the delivery of the deed in question plaintiff paid the various loans made by him about the date of such deed and received the properties which he had so conveyed by deed or bill of sale to other persons, with the exception of Svendsen, who admitted he held the chattels conveyed to him only as security.

To all major aspects of plaintiff's testimony which dealt with the understanding at the time the deed was prepared and executed conveying to defendant the property in question, defendant made a flat denial. He testified unequivocally that this was not a loan

bought the building and that it was based on a document prepared by one A. O. Smith.

This document was introduced in evidence and purported to be a lease between plaintiff, as lessor, and defendant, as lessee, dated July 1, 1946, providing for a rental of $75.00 per month until January 1, 1946, and $125.00 per month thereafter until July 1, 1955, and contained an option for defendant to purchase the property on or before July 1, 1946, together with the furnishings for $20,000.00. Plaintiff testified that this instrument was prepared at the request of defendant who stated that Aufderheide wanted that done, that it was done approximately two or three weeks after April 26, 1946, that he did not read the instrument, but merely signed it and did not ever have any copy thereof, and that he did not see a copy until the day he testified. Plaintiff further testified that the written lease did not in any way express any agreement existing between himself and defendant.

Plaintiff in his litigation on the construction contract testified that he had sold this building to defendant in order to get some money to finish that job.

After the delivery of the deed in question plaintiff paid the various loans made by him about the date of such deed and received the properties which he had so conveyed by deed or bill of sale to other persons, with the exception of Svendsen, who admitted he held the chattels conveyed to him only as security.

To all major aspects of plaintiff's testimony which dealt with the understanding at the time the deed was prepared and executed conveying to defendant the property in question, defendant made a flat denial. He testified unequivocally that this was not a loan

arrangement, that all he knew about plaintiff's difficulties were that plaintiff needed money quickly and that by selling the property to defendant funds could be raised speedily. He denied making the various admissions testified to by other witnesses. He testified that a few months after he purchased the property in question he cancelled the various insurance policies thereon and received a check for the return premiums, which he offered to plaintiff and which plaintiff asked him to cash, and that he did cash said check and turned the money over to plaintiff. He further testified that he hired plaintiff to put in the sidewalks and driveway and wanted to pay him for those, but plaintiff never sent a bill, that in the summer of 1945 he had made an oral arrangement with plaintiff to purchase the building for $20,000.00 as part of his leasing arrangement and that such lease was reduced to writing shortly after April 26, 1946, that this was done at defendant's suggestion because he wanted extra protection so that there could be no encroachment on his rights, and that at the time that instrument was signed plaintiff had no interest in the property. He denied that he dealt with plaintiff in any way in placing the $21,900.00 mortgage on the property as plaintiff testified, and stated that this mortgage was entered into in order to raise money to put the addition on the lot which he purchased subsequent to April 26, 1946, and he denied telling the parties at the time the deed was signed that they were not supposed to say anything about the deal, and that all they were supposed to do was sign the papers.

Defendant proved that immediately after April 26, 1946, he changed his records to show his ownership of the property, reported for income tax purposes the income therefrom, set up on his records a depreciation account for the building, a tax account, a prepaid

arrangement, that all he knew about plaintiff's difficulties were that plaintiff needed money quickly and that by selling the property to defendant funds could be raised speedily. He denied making the various admissions testified to by other witnesses. He testified that a few months after he purchased the property in question he cancelled the various insurance policies thereon and received a check for the return premiums, which he offered to plaintiff and which plaintiff asked him to cash, and that he did cash said check and turned the money over to plaintiff. He further testified that he hired plaintiff to put in the sidewalks and driveway and wanted to pay him for these, but plaintiff never sent a bill; that in the summer of 1945 he had made an oral arrangement with plaintiff to purchase the building for $20,000.00 as part of his leasing arrangement and that such lease was reduced to writing shortly after April 26, 1946, that this was done at defendant's suggestion because he wanted extra protection so that there could be no encroachment on his rights, and that at the time that instrument was signed plaintiff had no interest in the property. He denied that he dealt with plaintiff in any way in placing the $21,000.00 mortgage on the property as plaintiff testified, and stated that this mortgage was entered into in order to raise money to put the addition on the lot which he purchased subsequent to April 26, 1946, and he denied telling the parties at the time the deed was signed that they were not supposed to say anything about the deal, and that all they were supposed to do was sign the papers.

Defendant proved that immediately after April 26, 1946, he changed his records to show his ownership of the property, reported for income tax purposes the income therefrom, set up on his records a depreciation account for the building, a tax account, a prepaid

insurance account, an insurance expense account, and a mortgage payable account, and an accrued interest account.

A substantial number of witnesses were produced by plaintiff who testified to admissions by defendant which indicated plaintiff remained the owner of the premises in question, or who corroborated plaintiff's version of portions of the transaction. The defendant also produced witnesses who testified to admissions on the part of plaintiff that he did not own the building, or to facts which corroborated defendant's version of the transaction. Sixteen witnesses testified for plaintiff and nine for defendant. It is our opinion that it would serve no useful purpose for us to attempt to detail the testimony of such witnesses and would unduly extend this opinion.

The sole issue in this case is whether the deed was intended as security in the nature of a mortgage. This is purely a question of fact. Before such a question of fact can be decided in favor of a plaintiff he must prove by clear and convincing evidence that the instrument under attack was given as security and not as an absolute conveyance. (Gillock v. Holdaway, 379 Ill. 467.)

In this case the evidence on each side is wholly contradictory and irreconcilable.

The Master in Chancery heard the evidence from the mouths of the witnesses and had an opportunity to judge their demeanor on the witness stand. He was in a far better position than either the chancellor or this court to determine the credibility of the witnesses, and to determine what weight should be given to their testimony. It was his conclusion that the plaintiff failed to prove his case in accordance with the required standard. In this

insurance account, an insurance expense account, and a mortgage payable account, and an accrued interest account.

A substantial number of witnesses were produced by plaintiff who testified to admissions by defendant which indicated plaintiff remained the owner of the premises in question, or who corroborated plaintiff's version of portions of the transaction. The defendant also produced witnesses who testified to admissions on the part of plaintiff that he did not own the building, or to facts which corroborated defendant's version of the transaction. Sixteen witnesses testified for plaintiff and nine for defendant. It is our opinion that it would serve no useful purpose for us to attempt to detail the testimony of such witnesses and would unduly extend this opinion.

The sole issue in this case is whether the deed was intended as security in the nature of a mortgage. This is purely a question of fact. Before such a question of fact can be decided in favor of a plaintiff he must prove by clear and convincing evidence that the instrument under attack was given as security and not as an absolute conveyance. (Gillock v. Holdaway, 379 Ill. 467.)

In this case the evidence on each side is wholly contradictory and irreconcilable.

The Master in Chancery heard the evidence from the mouths of the witnesses and had an opportunity to judge their demeanor on the witness stand. He was in a far better position than either the chancellor or this court to determine the credibility of the witnesses, and to determine what weight should be given to their testimony. It was his conclusion that the plaintiff failed to prove his case in accordance with the required standard. In this

conclusion the chancellor sustained him.

It is settled that where the findings of a Master in Chancery are approved by the court, they will not be disturbed upon appeal unless they are manifestly against the weight of the evidence. (Finley v. Felter, 403 Ill. 372; Branigar v. Village of Riverdale, 396 Ill. 534.)

The conflict of evidence is so great and the corroborating circumstances on each side are so voluminous, that this court cannot say that the findings of the Master in Chancery were manifestly against the weight of the evidence.

It is therefore our opinion that the decree of the trial court should be affirmed.

Affirmed.

conclusion the chancellor sustained him.

It is settled that where the findings of a Master in Chancery are approved by the court, they will not be disturbed upon appeal unless they are manifestly against the weight of the evidence. (Finley v. Felter, 405 Ill. 372; Branger v. Village of Riverdale, 396 Ill. 584.)

The conflict of evidence is so great and the corroborating circumstances on each side are so voluminous, that this court cannot say that the findings of the Master in Chancery were manifestly against the weight of the evidence.

It is therefore our opinion that the decree of the trial court should be affirmed.

Affirmed.

5

2013

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT
May Term, A.D. 1951

General No. 9754.

Agenda No. 12

343 I.A. 462

JOHN W. GERHARDT, Plaintiff-Appellant, -vs- CHARLES BOYNTON WARREN, CORDELIA W. SMITH, W. M. PFEFFER, E. MARIE CHISM and WARREN BOYNTON STATE BANK, an Illinois Banking Corporation, Defendants-Appellees.	)	Appeal from Circuit Court of Sangamon County.

DADY, J:

Plaintiff-Appellant filed this suit in the Circuit Court of Sangamon County on March 24, 1947, to redeem 198 acres of farm land from a warranty deed given by plaintiff to W. M. Pfeffer, which deed plaintiff claimed was intended as a mortgage,- also for an accounting of rents and profits from the premises described in the deed, and for a reconveyance of the premises to the plaintiff. The other defendants are Charles Boynton Warren, Cordelia W. Smith, E. Marie Chism, hereafter referred to as "Miss Chism," and Warren Boynton State Bank, an Illinois corporation. After the proofs were closed, and after the Master in Chancery filed his report, but before the decree appealed from was entered, the defendants Charles Boynton Warren and Cordelia W. Smith filed their counter-claim asking that a certain instrument, entitled "Caveat," filed in the recorder's office by the plaintiff be removed as a cloud on counter-claimants' title to the real estate,

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT
May Term, A.D. 1951

General No. 9764. Agenda No. 12

JOHN W. GERHARDT, Plaintiff-Appellant, -vs- CHARLES BOYNTON WARREN, CORDELIA W. SMITH, W. M. PFEFFER, E. MARIE CHIGM and WARREN BOYNTON STATE BANK, an Illinois Banking Corporation, Defendants-Appellees.	Appeal from Circuit Court of Sangamon County.

DADY, J:

Plaintiff-Appellant filed this suit in the Circuit Court of Sangamon County on March 24, 1947, to redeem 188 acres of farm land from a warranty deed given by plaintiff to W. M. Pfeffer, which deed plaintiff claimed was intended as a mortgage,- also for an accounting of rents and profits from the premises described in the deed, and for a reconveyance of the premises to the plaintiff. The other defendants are Charles Boynton Warren, Cordelia W. Smith, E. Marie Chigm, hereafter referred to as "Miss Chigm," and Warren Boynton State Bank, an Illinois corporation. After the proofs were closed, and after the Master in Chancery filed his report, but before the decree appealed from was entered, the defendants Charles Boynton Warren and Cordelia W. Smith filed their counter-claim asking that a certain instrument, entitled "Caveat," filed in the recorder's office by the plaintiff be removed as a cloud on counter-claimants' title to the real estate,

and that the title to said real estate be confirmed in counter-claimants free of any title or interest in plaintiff.

Answers were duly filed to the complaint and counter-claim.

There is no question involved as to the sufficiency of the pleadings.

The cause was referred to a Master in Chancery, who, after hearing the evidence, made a report recommending a decree in favor of defendants, and thereafter overruled all objections thereto.

Thereafter the court overruled all exceptions to and approved such report, and entered a decree dismissing the complaint for want of equity, and granting counter-claimants the relief asked by them in their counter-claim, that is decreeing Charles Boynton Warren and Cordelia E. Smith to be the owners of the premises free of all claims of plaintiff, and removing the "Caveat" hereafter referred to as a cloud on their title to the premises.

Plaintiff brings this appeal from such decree.

The undisputed facts show the following:

At all times in question Pfeffer was cashier and Miss Chism was assistant cashier of the bank, and at all such times Pfeffer was the agent of and acting for Charles Boynton Warren and Cordelia W. Smith, who were stockholders in the bank.

On October 21, 1935, the plaintiff, a bachelor then aged about 43 years, was the owner and in possession of the premises and executed and delivered to Pfeffer a mortgage thereon to secure a loan to plaintiff of $18,500.00 represented by a note of the same date bearing interest at 5% per annum, due October 1, 1936. The proceeds of this loan were used by plaintiff to pay an existing mortgage indebtedness on the premises held by an

and that the title to said real estate be confirmed in counter-claimants free of any title or interest in plaintiff.

Answers were duly filed to the complaint and counter-claim. There is no question involved as to the sufficiency of the pleadings.

The cause was referred to a Master in Chancery, who, after hearing the evidence, made a report recommending a decree in favor of defendants, and thereafter overruled all objections thereto.

Thereafter the court overruled all exceptions to and approved such report, and entered a decree dismissing the complaint for want of equity, and granting counter-claimants the relief asked by them in their counter-claim, that is decreeing Charles Boynton Warren and Cordelia E. Smith to be the owners of the premises free of all claims of plaintiff, and removing the "Caveat" hereafter referred to as a cloud on their title to the premises.

Plaintiff brings this appeal from such decree.

The undisputed facts show the following:

At all times in question Pfeffer was cashier and Miss Chiem was assistant cashier of the bank, and at all such times Pfeffer was the agent of and acting for Charles Boynton Warren and Cordelia W. Smith, who were stockholders in the bank.

On October 21, 1935, the plaintiff, a bachelor then aged about 43 years, was the owner and in possession of the premises and executed and delivered to Pfeffer a mortgage thereon to secure a loan to plaintiff of $18,500.00 represented by a note of the same date bearing interest at 5% per annum, due October 1, 1936. The proceeds of this loan were used by plaintiff to pay an existing mortgage indebtedness on the premises held by an

insurance company and to pay other indebtedness of plaintiff.

The mortgage and note were taken in the name of Miss Chism but in behalf of Ella Warren, who owned the funds so loaned to plaintiff. Thereafter Ella Warren made a gift of such mortgage and note to her children, Charles Boynton Warren and Cordelia W. Smith.

On February 6, 1939, plaintiff gave to the bank a junior mortgage on said premises to secure an indebtedness of $1,500.00 which he then owed the bank,- the note secured by such mortgage being due February 6, 1940.

On or about September 5, 1939, plaintiff for a recited consideration of "One dollar and other good and valuable consideration," executed and delivered to Pfeffer the deed sought to be redeemed from. It was a warranty deed dated September 5, 1939, conveying the premises to Pfeffer. The deed stated it was subject to such "first mortgage loan in the sum of $18,500.00" and to a "junior mortgage in the sum of $1,500.00". It stated that "the consideration in this deed being less than $100.00 no revenue stamp is required."

By deed dated December 30, 1939, Pfeffer and wife conveyed said premises to Charles Boynton Warren and Cordelia W. Smith for a recited consideration of $3,198.00.

The $18,500.00 mortgage was released of record by release deed executed by Miss Chism, dated December 30, 1939, and recorded January 6, 1940.

The $1,500.00 mortgage was released of record by release deed executed by the bank, dated December 30, 1939, and recorded January 30, 1940.

insurance company and to pay other indebtedness of plaintiff.

The mortgage and note were taken in the name of Miss Chiem but in behalf of Ella Warren, who owned the funds so loaned to plaintiff. Thereafter Ella Warren made a gift of such mortgage and note to her children, Charles Boynton Warren and Cordelia W. Smith.

On February 6, 1939, plaintiff gave to the bank a junior mortgage on said premises to secure an indebtedness of $1,500.00 which he then owed the bank,- the note secured by such mortgage being due February 6, 1940.

On or about September 5, 1939, plaintiff for a recited consideration of "One dollar and other good and valuable consideration," executed and delivered to Pfeffer the deed sought to be redeemed from. It was a warranty deed dated September 5, 1939, conveying the premises to Pfeffer. The deed stated it was subject to such "first mortgage loan in the sum of $18,500.00" and to a "junior mortgage in the sum of $1,500.00". It stated that "the consideration in this deed being less than $100.00 no revenue stamp is required."

By deed dated December 30, 1939, Pfeffer and wife conveyed said premises to Charles Boynton Warren and Cordelia W. Smith for a recited consideration of $3198.00.

The $18,500.00 mortgage was released of record by release deed executed by Miss Chiem, dated December 30, 1939, and recorded January 6, 1940.

The $1,500.00 mortgage was released of record by release deed executed by the bank, dated December 30, 1939, and recorded January 30, 1940.

After the settlement of January 5, 1940, hereafter referred to, and until sometime in the year 1943, the plaintiff remained in possession of the premises, but did so on a "fifty-fifty" crop rental basis under the terms of a verbal lease with Charles Boynton Warren and Cordelia W. Smith made through their agents.

On January 23, 1947, plaintiff filed in the recorder's office a document entitled "Caveat," thereby giving notice that he claimed an interest in the premises.

The deed sought to be redeemed from was executed and delivered in the bank. There is some conflict in the testimony as to what was said by plaintiff and Pfeffer at the time of such delivery.

Plaintiff testified that when the deed was given by him he told Pfeffer that he had arranged for another loan, that Pfeffer said "Fine, but you had better deed us this farm temporarily, while you are getting this loan we must have security from you in case something should happen to you, *** and I am asking you to give me a deed for security while you are getting this loan," and said "Just as soon as you can arrange for a loan you can come right in and pay us off," that "I think he gave me three months in which to pay off the bank," that at that time Pfeffer told him the farm was worth in his opinion $125.00 an acre "as a temporary settlement," and said that the sooner the plaintiff got the money the better, and "I said I would like for you to write out a contract," and Pfeffer said "What are you worrying about, you are farming the ground, *** I am busy."

Pfeffer testified that at the time such deed was executed and delivered he prepared a statement showing all of plaintiff's indebtedness and showed it to him and he and plaintiff went over it,

After the settlement of January 5, 1940, hereafter referred to, and until sometime in the year 1943, the plaintiff remained in possession of the premises, but did so on a "fifty-fifty" crop rental basis under the terms of a verbal lease with Charles Boynton Warren and Cordelia W. Smith made through their agents.

On January 25, 1947, plaintiff filed in the recorder's office a document entitled "Caveat," thereby giving notice that he claimed an interest in the premises.

The deed sought to be redeemed from was executed and delivered in the bank. There is some conflict in the testimony as to what was said by plaintiff and Pfeffer at the time of such delivery.

Plaintiff testified that when the deed was given by him he told Pfeffer that he had arranged for another loan, that Pfeffer said "Fine, but you had better deed us this farm temporarily, while you are getting this loan we must have security from you in case something should happen to you, *** and I am asking you to give me a deed for security while you are getting this loan," and said "Just as soon as you can arrange for a loan you can come right in and pay us off," that "I think he gave me three months in which to pay off the bank," that at that time Pfeffer told him the farm was worth in his opinion $125.00 an acre "as a temporary settlement," and said that the sooner the plaintiff got the money the better, and "I said I would like for you to write out a contract," and Pfeffer said "What are you worrying about, you are farming the ground, *** I am busy."

Pfeffer testified that at the time such deed was executed and delivered he prepared a statement showing all of plaintiff's indebtedness and showed it to him and he and plaintiff went over it,

that he then told plaintiff something would have to be done, that "we" could not continue to let it get any larger, that he suggested that the plaintiff make a deed for the land to Pfeffer and that he, Pfeffer, would hold the deed and would give plaintiff until the end of the year to raise the money, and if the plaintiff could raise the money or sell the land "we would be glad to accept the money, and deed the land to whoever the plaintiff might designate," but that he, Pfeffer, for the Warrens, would give the plaintiff $125.00 an acre, and "we would settle at the end of the year in case he could not or did not raise the money," and that the deed was never mentioned as security.

Pfeffer further testified that about January 5, 1940, when the deed was executed, the plaintiff was in the bank, that Pfeffer then prepared and showed plaintiff a statement of plaintiff's indebtedness and of the value of the land computed at $125.00 per acre, that such statement showed a then balance of $3,198.00 coming to plaintiff and plaintiff then "accepted the statement at $125.00 an acre" and a check for $3,198.00 was then drawn by Pfeffer, which check plaintiff then deposited in plaintiff's account in the bank, and that plaintiff then drew checks on the bank for the amounts due other creditors, which then left a balance of about $2,000.00 in plaintiff's bank account, and that at the time of such settlement on January 5th the $18,500.00 mortgage and the $1,500.00 mortgage and the notes thereby secured were cancelled and surrendered to plaintiff.

The defendants introduced in evidence such settlement statement and photostats of plaintiff's bank account covering the period in question. The statement showed that on computing the

that he then told plaintiff something would have to be done, that "we" could not continue to let it get any larger, that he suggested that the plaintiff make a deed for the land to Pfeffer and that he, Pfeffer, would hold the deed and would give plaintiff until the end of the year to raise the money, and if the plaintiff could raise the money or sell the land "we would be glad to accept the money, and deed the land to whoever the plaintiff might designate," but that he, Pfeffer, for the Warrens, would give the plaintiff $125.00 an acre, and "we would settle at the end of the year in case he could not or did not raise the money," and that the deed was never mentioned as security.

Pfeffer further testified that about January 5, 1940, when the deed was executed, the plaintiff was in the bank, that Pfeffer then prepared and showed plaintiff a statement of plaintiff's indebtedness and of the value of the land computed at $125.00 per acre, that such statement showed a then balance of $3,198.00 coming to plaintiff and plaintiff then "accepted the statement at $125.00 an acre" and a check for $3,198.00 was then drawn by Pfeffer, which check plaintiff then deposited in plaintiff's account in the bank, and that plaintiff then drew checks on the bank for the amounts due other creditors, which then left a balance of about $3,000.00 in plaintiff's bank account, and that at the time of such settlement on January 5th the $18,300.00 mortgage and the $1,500.00 mortgage and the notes thereby secured were cancelled and surrendered to plaintiff.

The defendants introduced in evidence such settlement statement and photostats of plaintiff's bank account covering the period in question. The statement showed that on computing the

acreage at $125.00 per acre, and deducting therefrom the indebtedness on the two mortgages there was due plaintiff $3,198.00. These computations are not questioned.

Defendant did not testify to the transaction of January 5, 1940, but did testify that the notes and mortgages were never surrendered to him.

The plaintiff did not at any time prior to the commencement of this suit on March 24, 1947, make any tender of payment of the amounts that would have been due from him on either mortgage had the deed in question not been delivered and the settlement of January 5, 1940, not been made.

The decree found that at the time the deed was executed and delivered Pfeffer, as such agent, offered to purchase from plaintiff the premises at $125.00 per acre, to be paid by cancellation of the indebtedness and the balance in cash, such offer to remain until December 31, 1939, and that if prior thereto plaintiff could find any other purchaser who would pay therefor in excess of $125.00 per acre, or if plaintiff could elsewhere obtain a loan sufficient to pay the indebtedness, then Pfeffer would convey the premises as directed by Gerhardt, that prior to December 31, 1939, the plaintiff found no purchaser willing to pay in excess of $125.00 per acre, and did not obtain a loan or commitment for any loan from any other person sufficient in amount to pay such indebtedness, that during the last week of December, 1939, or the first week of January, 1940, plaintiff and Pfeffer again met, at which meeting Pfeffer again offered to purchase from the plaintiff all of plaintiff's interest in the premises at $125.00 per acre, that said offer was a fair

mortgage at $125.00 per acre, and deducting therefrom the indebtedness on the two mortgages there was due plaintiff $3,198.00. These computations are not questioned.

Defendant did not testify to the transaction of January 5, 1940, but did testify that the notes and mortgages were never surrendered to him.

The plaintiff did not at any time prior to the commencement of this suit on March 24, 1947, make any tender of payment of the amounts that would have been due from him on either mortgage had the deed in question not been delivered and the settlement of January 5, 1940, not been made.

The decree found that at the time the deed was executed and delivered Pfeffer, as such agent, offered to purchase from plaintiff the premises at $125.00 per acre, to be paid by cancellation of the indebtedness and the balance in cash, such offer to remain until December 31, 1939, and that if prior thereto plaintiff could find any other purchaser who would pay therefor in excess of $125.00 per acre, or if plaintiff could elsewhere obtain a loan sufficient to pay the indebtedness, then Pfeffer would convey the premises as directed by Gerhardt, that prior to December 31, 1939, the plaintiff found no purchaser willing to pay in excess of $125.00 per acre, and did not obtain a loan or commitment for any loan from any other person sufficient in amount to pay such indebtedness, that during the last week of December, 1939, or the first week of January, 1940, plaintiff and Pfeffer again met, at which meeting Pfeffer again offered to purchase from the plaintiff all of plaintiff's interest in the premises at $125.00 per acre, that said offer was a fair

and reasonable price for the property, that no confidential or fiduciary relationship existed between the parties, and no fraud, duress or unfair advantage of any kind or character was taken of or exercised over plaintiff, but that the plaintiff being fully advised accepted such offer and the transaction was consummated by cancellation of the indebtedness owed Charles Boynton Warren and Cordelia W. Smith, and the payment of $3,198.00 in cash to the plaintiff, that Gerhardt accepted said payment in full of the purchase price and deposited the cash in his personal account, and thereafter withdrew the same from time to time and used it in payment of his other personal indebtedness and expenses, and that thereafter the mortgages and notes thereby secured were cancelled and released of record and returned to the plaintiff.

It is our opinion that the evidence fully justified such findings in the decree.

The decree appealed from found "that although said deed was absolute in form, its legal effect was only additional security for the indebtedness aforesaid owed by the said John W. Gerhardt to the said Charles Boynton Warren and Cordelia W. Smith."

It is our opinion that in determining the rights of the respective parties, we are not limited by any interpretation of the character of the deed in question.

In Monarski v. Greb, 407 Ill. 281, 291, the court said: "A decree may be sustained upon any ground warranted by the record, irrespective of whether the particular reasons given by the trial judge or his specific findings are correct." In People v. Bradford, 372 Ill. 63, 65, the court said: "Having obtained all the relief they deemed themselves entitled to, they may sustain

and reasonable price for the property, that no confidential or fiduciary relationship existed between the parties, and no fraud, duress or unfair advantage of any kind or character was taken of or exercised over plaintiff, but that the plaintiff being fully advised accepted such offer and the transaction was consummated by cancellation of the indebtedness owed Charles Boynton Warren and Cordelia W. Smith, and the payment of $3,198.00 in cash to the plaintiff, that Gerhardt accepted said payment in full of the purchase price and deposited the cash in his personal account, and thereafter withdrew the same from time to time and used it in payment of his other personal indebtedness and expenses, and that thereafter the mortgages and notes thereby secured were cancelled and released of record and returned to the plaintiff.

It is our opinion that the evidence fully justified such findings in the decree.

The decree appealed from found "that although said deed was absolute in form, its legal effect was only additional security for the indebtedness aforesaid owed by the said John W. Gerhardt to the said Charles Boynton Warren and Cordelia W. Smith."

It is our opinion that in determining the rights of the respective parties, we are not limited by any interpretation of the character of the deed in question.

In Konarski v. Grab, 407 Ill. 281, 291, the court said: "A decree may be sustained upon any ground warranted by the record, irrespective of whether the particular reasons given by the trial judge or his specific findings are correct." In Foggia v. Bradford, 372 Ill. 85, 85, the court said: "That the appellees having obtained all the relief they deemed themselves entitled to, they may sustain

the judgment up on any ground warranted by the record, ***."

In Scanlan v. Scanlan, 134 Ill. 630, 645, the court said: "Where a mortgage is in the form of an absolute conveyance, a bona fide agreement between the parties to vest the entire estate in the mortgagee will be sustained, and the execution of a formal deed will not be required, provided the transaction is fair, and not attended with oppression or fraud or undue influence, and the mortgagee has not availed himself of his position to obtain an advantage over the mortgagor." (See also Cramer v. Wilson, 202 Ill. 83.)

Obviously the $3,198.00 so paid the plaintiff was not a loan in addition to the loans already on the premises, the principal and interest of which were long past due, but was in fact a fair and complete payment of all moneys due the plaintiff for his interest in the premises.

For the reasons indicated the decree appealed from is affirmed.

Affirmed.

the judgment on any ground warranted by the record. . ***."

In Scanlan v. Scanlan, 124 Ill. 680, 646, the court said:

"Where a mortgage is in the form of an absolute conveyance, a bona fide agreement between the parties to vest the entire estate in the mortgagee will be sustained, and the execution of a formal deed will not be required, provided the transaction is fair, and not attended with oppression or fraud or undue influence, and the mortgagee has not availed himself of his position to obtain an advantage over the mortgagor." (See also Cramer v. Wilson, 202 Ill. 93.)

Obviously the $3,198.00 so paid the plaintiff was not a loan in addition to the loans already on the premises, the principal and interest of which were long past due, but was in fact a fair and complete payment of all moneys due the plaintiff for his interest in the premises.

For the reasons indicated the decree appealed from is affirmed.

Affirmed.

2113

6

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D.1951

General No. 9746 Agenda No. 2

People of the State of Illinois, Plaintiff-Defendant in Error,	Error to County Court of Douglas County
vs.	
Jesse Harris, Defendant-Plaintiff in Error.	

Wheat, J.

In this proceeding plaintiff in error, Jesse Harris, aged thirteen, was declared a delinquent child by order of the County Court of Douglas County, Illinois, following a hearing by the Court without a jury. He was committed to the Illinois State Training School for Boys at St. Charles. This writ of error follows.

Although numerous errors are assigned, such as failure to make and preserve a report of proceedings, lack of jury trial when such was not waived, failure of the Court to appoint counsel or guardian ad litem for defendant, failure of proper showing that defendant's rights were explained to him, and failure of the record to show any plea, all may be merged in the general claim that the rights of the defendant were not adequately protected in the proceeding.

A petition was filed in the County Court by the States Attorney on June 17th, 1950, alleging that defendant was a delinquent child in that, without just cause he wandered about

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D.1951

General No. 9746 Agenda No. 2

People of the State of Illinois, Plaintiff-Defendant in Error,	Error to County Court of Douglas County
vs.	
Jesse Harris, Defendant-Plaintiff in Error.	

Wheat, J.

In this proceeding plaintiff in error, Jesse Harris, aged thirteen, was declared a delinquent child by order of the County Court of Douglas County, Illinois, following a hearing by the Court without a jury. He was committed to the Illinois State Training School for Boys at St. Charles. This writ of error follows.

Although numerous errors are assigned, such as failure to make and preserve a report of proceedings, lack of jury trial when such was not waived, failure of the Court to appoint counsel or guardian ad litem for defendant, failure of proper showing that defendant's rights were explained to him, and failure of the record to show any plea, all may be merged in the general claim that the rights of the defendant were not adequately protected in the proceeding.

A petition was filed in the County Court by the States Attorney on June 17th, 1950, alleging that defendant was a delinquent child in that, without just cause he wandered about

the streets without being on any lawful occupation, that such child's mother was unable to control and discipline him, and that on June 12th, 1950, he made an attack upon another child and did certain other things so revolting as ought not to be set forth in this opinion. Writs of summons were served upon the defendant and his mother on June 19th, 1950, and hearing was had three days later on June 22nd, 1950, at which time the order above referred to was entered.

No report of proceedings is required by statute in a case of this kind and none was presented to this Court by reason of which it does not appear what evidence activated the Court. Certain exhibits of a revolting nature have been certified to this Court. The statement of the trial court as to his findings is most sincere and persuasive. No absolute rule can be enunciated for all cases as to proper trial procedure under the statute, however, it would seem that as to the instant case wherein a thirteen year old boy and his mother are summoned for a hearing to be held three days later and where it does not appear that any probation officer appeared before the Court, nor was any attorney nor guardian ad litem appointed to represent the child, then his rights were not fully protected.

There is the additional question of jurisdiction of the Court. Chapter 23, Paragraph 193, Illinois Revised Statutes, 1949 (Charities), relates to the form and contents of the petition and among other things provides as follows: "The petition shall also set forth, either the name, or that the name is unknown to petitioner (a) of the person having the custody of such child; and (b) of ~~the name~~ each of the parents or the surviving

the streets without being on any lawful occupation, that such child's mother was unable to control and discipline him, and that on June 14th, 1950, he made an attack upon another child and did certain other things so revolting as ought not to be set forth in this opinion. Writs of summons were served upon the defendant and his mother on June 14th, 1950, and hearing was had three days later on June 22nd, 1950, at which time the order above referred to was entered.

No report of proceedings is required by statute in a case of this kind and none was presented to this Court by reason of which it does not appear what evidence activated the Court. Certain exhibits of a revolting nature have been certified to this Court. The statement of the trial court as to his findings is most sincere and persuasive. No absolute rule can be enunciated for all cases as to proper trial procedure under the statute, however, it would seem that as to the instant case wherein a thirteen year old boy and his mother are summoned for a hearing to be held three days later and where it does not appear that any probation officer appeared before the Court, nor was any attorney nor guardian ad litem appointed to represent the child, then his rights were not fully protected.

There is the additional question of jurisdiction of the Court. Chapter 23, Paragraph 193, Illinois Revised Statutes, 1949 (Charities), relates to the form and contents of the petition and among other things provides as follows: "The petition shall also set forth, either the name, or that the name is unknown to petitioner (a) of the person having the custody of such child; and (b) of ~~the~~ [illegible] of the parents or the surviving

parent of a legitimate child or of the mother of an illegitimate child * * * All persons as named in such petition shall be made defendants by name and shall be notified of such proceedings by summons * * * All persons, if any who or whose names are stated in the petition to be unknown to petitioner, shall be deemed and taken as defendants by the name or designation of 'all whom it may concern'. * * * Process shall be issued against all persons made parties by the designation of 'all whom it may concern', by such description, and notice given by publication as is required in this act". Section 194 of the act provides that where any person is made defendant under the name or designation of "all whom it may concern" the clerk shall cause publication to be made once in some newspaper of general circulation giving notice to such person, provides for the mailing of a copy of such notice to such defendant if his address is stated in the petition, and provides that the certificate of the clerk showing compliance with this paragraph shall be filed. In the instant case the petition does not set forth herein the name of the father of the child or that his name was unknown and he was not served herein by writ of summons or by publication. It is argued in defendant's brief that the child's father is living and at the time of the proceedings was serving a sentence in the Illinois State Penitentiary. The State's Attorney argues that the Court had jurisdiction of the defendant because his mother was served with summons and no facts were presented in the record showing that plaintiff in error had a legal father. This is immaterial.

parent of a legitimate child or of the mother of an illegitimate child * * * All persons as named in such petition shall be made defendants by name and shall be notified of such proceedings by summons * * * All persons, if any who or whose names are stated in the petition to be unknown to petitioner, shall be deemed and taken as defendants by the name or designation of 'all whom it may concern'. * * * Process shall be issued against all persons made parties by the designation of 'all whom it may concern', by such description, and notice given by publication as is required in this act". Section 1Ph of the act provides that where any person is made defendant under the name or designation of "all whom it may concern" the clerk shall cause publication to be made once in some newspaper of general circulation giving notice to such person, provides for the mailing of a copy of such notice to such defendant if his address is stated in the petition, and provides that the certificate of the clerk showing compliance with this paragraph shall be filed. In the instant case the petition does not set forth herein the name of the father of the child or that his name was unknown and he was not served herein by writ of summons or by publication. It is argued in defendant's brief that the child's father is living and at the time of the proceedings was serving a sentence in the Illinois State Penitentiary. The State's Attorney argues that the Court had jurisdiction of the defendant because his mother was served with summons and no facts were presented in the record showing that plaintiff in error had a legal father. This is immaterial.

The provision of the statute makes it mandatory that the petitioner set forth the names of each of the parents and that service of process be had upon them. This is jurisdictional and as it was not done the County Court had no jurisdiction to proceed with the hearing and the order is void. The order of the County Court is reversed and the cause remanded.

Reversed and remanded.

The provision of the statute makes it mandatory that the petitioner set forth the names of each of the parents and that service of process be had upon them. This is jurisdictional and as it was not done the County Court had no jurisdiction to proceed with the hearing and the order is void. The order of the County Court is reversed,and the cause remanded.

reversed,and remanded.

Abstract

212

STATE OF ILLINOIS

APPELLATE COURT | THIRD DISTRICT

MAY TERM, A.D. 1951

343 I.A. 463

General No. 9747 | Agenda No. 3

People of the State of Illinois, Plaintiff-Defendant in Error,	
vs.	Error to County Court of Douglas County
Jimmy Wills, Defendant-Plaintiff in Error.	

Wheat, J.

In this proceeding plaintiff in error, Jimmy Wills, aged fourteen, was declared a delinquent child by order of the County Court of Douglas County, Illinois, following a hearing by the Court without a jury. He was committed to the Illinois State Training School for Boys at St. Charles. This writ of error follows.

Plaintiff in error in the delinquency petition was charged with substantially the same acts as was charged in the petition in the case of Jesse Harris, plaintiff in error vs. The People, No. 9746, in which case the opinion has heretofore been filed. Both boys were together in the commission of the several acts charged. The proceedings were identical and the only distinguishing feature of the two cases is that in the instant case both parents were served with writs of summons. By reason of the conclusion reached in case No. 9746 in which it was held that the rights of the plaintiff in error were not fully protected, the order of the County Court will be and is reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D.1951

General No. 9747 Agenda No. 3

People of the State of Illinois, Plaintiff-Defendant in Error,	
vs.	Error to County Court of Douglas County
Jimmy Mills, Defendant-Plaintiff in Error.	

Bneat, J.

In this proceeding plaintiff in error, Jimmy Mills, aged fourteen, was declared a delinquent child by order of the County Court of Douglas County, Illinois, following a hearing by the Court without a jury. He was committed to the Illinois State Training School for Boys at St. Charles. This writ of error follows.

Plaintiff in error in the delinquency petition was charged with substantially the same acts as was charged in the petition in the case of Jesse Harris, plaintiff in error vs. The People, No. 9746, in which case the opinion has heretofore been filed. Both boys were together in the commission of the several acts charged. The proceedings were identical and the only distinguishing feature of the two cases is that in the instant case both parents were served with writs of summons. By reason of the conclusion reached in case No. 9746 in which it was held that the rights of the plaintiff in error were not fully protected, the order of the County Court will be and is reversed, and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D. 1951

343 I.A. 463²

General No. 9770 Agenda No. 23

Sam Kanter, Plaintiff-Appellant, vs. William O'Hara, Defendant-Appellee.	Appeal from Circuit Court of Scott County

Wheat, J.

This is an action for damages by reason of personal injuries to the plaintiff-appellant Sam Kanter, against the defendant-appellee William O'Hara, arising out of a collision between plaintiff's automobile and defendant's truck. The jury returned a verdict in favor of the defendant and upon denial of motion for a new trial this appeal follows.

It is first urged that the verdict is contrary to the manifest weight of the evidence. About 7:30 P.M. on the night of January 22, 1948, on a dry pavement, defendant was operating his truck, loaded with lumber, in an easterly direction on Route 36 just west of the city limits of Winchester, Illinois. He drove such truck onto the shoulder on the south side of the concrete pavement, just west of a gravel road extending to the south, and stopped the same. Shortly thereafter he started the motor and backed the truck partly onto the concrete highway at which time his motor stalled. Some

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D.1951

General No. 9770 Agenda No. 23

Sam Kanter, Plaintiff-Appellant, vs. William O'Hara, Defendant-Appellee.	Appeal from Circuit Court of Scott County

Wheat, J.

This is an action for damages by reason of personal injuries to the plaintiff-appellant Sam Kanter, against the defendant-appellee William O'Hara, arising out of a collision between plaintiff's automobile and defendant's truck. The jury returned a verdict in favor of the defendant and upon denial of motion for a new trial this appeal follows.

It is first urged that the verdict is contrary to the manifest weight of the evidence. About 7:30 P.M. on the night of January 22, 1948, on a dry pavement, defendant was operating his truck, loaded with lumber, in an easterly direction on Route 36 just west of the city limits of Winchester, Illinois. He drove such truck onto the shoulder on the south side of the concrete pavement, just west of a gravel road extending to the south, and stopped the same. Shortly thereafter he started the motor and backed the truck partly onto the concrete highway at which time his motor stalled. Some

testimony indicates that he could not have gone forward because of a concrete culvert ahead of his truck. He was unable to start the motor either by use of the starter or by hand crank. He put out no flares or other warning. The complaint charged and the answer admitted that he failed to carry and use flares. A pedestrian unsuccessfully attempted to aid him in starting the motor. Defendant hailed and stopped another truck approaching from the east and requested a push. The latter driver stopped his truck on the north edge of the highway sixty or seventy feet east of the truck of defendant, and suggested to defendant that he ought to put out some warning lights, and handed him a fusee for that purpose. Both men then saw plaintiff's car approaching from the west. Defendant says he ran westerly and waved his arms. The other truck driver turned his headlights off and on several times in an attempt to warn plaintiff. The latter's car crashed into the rear end of defendant's truck, leaving skid or tire marks for a distance of about fifty feet. The truck was pushed forward about ten feet. Under this state of the record the questions of plaintiff's due care and defendant's negligence were for the jury, and it cannot be said the verdict was contrary to the manifest weight of the evidence.

Plaintiff urges that the trial court erred in not permitting him to put in evidence the docket of a Justice of the Peace, indicating that after the accident defendant pleaded guilty to a charge that he "did not have protection from behind said truck". The complaint charged and the answer admitted that no flares were placed on the highway. The docket of the Justice of the Peace relating to an ambiguous charge was incompetent. Such could not be construed to mean that there were no tail lights or rear-end

testimony indicates that he could not have gone forward because of a concrete culvert ahead of his truck. He was unable to start the motor either by use of the starter or by hand crank. He put out no flares or other warning. The complaint charged and the answer admitted that he failed to carry and use flares. A pedestrian unsuccessfully attempted to aid him in starting the motor. Defendant hailed and stopped another truck approaching from the east and requested a push. The latter driver stopped his truck on the north edge of the highway sixty or seventy feet east of the truck of defendant, and suggested to defendant that he ought to put out some warning lights, and handed him a flare for that purpose. Both men then saw plaintiff's car approaching from the west. Defendant says he ran westerly and waved his arms. The other truck driver turned his headlights off and on several times in an attempt to warn plaintiff. The latter's car crashed into the rear end of defendant's truck, leaving skid or tire marks for a distance of about fifty feet. The truck was pushed forward about ten feet. Under this state of the record the questions of plaintiff's due care and defendant's negligence were for the jury, and it cannot be said the verdict was contrary to the manifest weight of the evidence.

Plaintiff urges that the trial court erred in not permitting him to put in evidence the docket of a Justice of the Peace, indicating that after the accident defendant pleaded guilty to a charge that he "did not have protection from behind said truck". The complaint charged and the answer admitted that no flares were placed on the highway. The docket of the Justice of the Peace relating to an ambiguous charge was incompetent. Such could not be construed to mean that there were no tail lights or rear-end

lights burning on the truck at the time of the accident. Of course had the defendant admitted the latter charge to the Justice of the Peace or any one else it would have been competent.

Complaint is made as to the giving of certain of defendant's instructions. It will be necessary to consider only one of these, the 12th, as upon a new trial any error in the others will no doubt be obviated. This instruction was as follows, (italics added):

> The Court instructs the jury that if you believe from all the evidence that the defendant, William O'Hara, *just prior* to the collision in question, without fault on his part, found himself confronted with an emergency in the driving of his truck in that the motor of the same refused to operate, and that *immediately* upon so ascertaining such fact he attempted to start such motor and *immediately* thereafter attempted to set out a fusee for the purpose of warning approaching traffic from the west, and that before he had time to do so he ascertained that the motor vehicle of the plaintiff was approaching from the rear of said truck, and that he *immediately* ran to the rear of said truck and attempted to warn the plaintiff by waving his hands and arms and was unable to do so, and that the collision occurred between said truck and said motor vehicle of the plaintiff, all without any negligence on the part of said defendant, William O'Hara, *then you should find the defendant not guilty*.

Although a party has the right to present his theory of the case to the jury by an instruction, such should not be argumentative, nor should it embody facts not reasonably inferrable from the evidence. The instruction used the word "immediately" three times. Defendant testified that after his motor stalled he used the starter several times in an unsuccessful attempt to get it started again; that the witness Anders approached on foot from the west and upon request used the starter while defendant cranked the motor; defendant then lifted the hood to determine if the motor was getting gas. Anders stated that about ten minutes elapsed from the time he first saw defendant's truck until he heard the crash, at which time he was proceeding east toward Winchester about one hundred to

lights burning on the truck at the time of the accident. Of course had the defendant admitted the latter charge to the Justice of the Peace or any one else it would have been competent.

Complaint is made as to the giving of certain of defendant's instructions. It will be necessary to consider only one of these, the 12th, as upon a new trial any error in the others will no doubt be obviated. This instruction was as follows, (italics added):

> The Court instructs the jury that if you believe from all the evidence that the defendant, William O'Hara, *just prior* to the collision in question, without fault on his part, found himself confronted with an emergency in the driving of his truck in that the motor of the same refused to operate, and that *immediately* upon so ascertaining such fact he attempted to start such motor and *immediately* thereafter attempted to set out a fusee for the purpose of warning approaching traffic from the west, and that before he had time to do so he ascertained that the motor vehicle of the plaintiff was approaching from the rear of said truck, and that he *immediately* ran to the rear of said truck and attempted to warn the plaintiff by waving his hands and arms and was unable to do so, and that the collision occurred between said truck and said motor vehicle of the plaintiff, all without any negligence on the part of said defendant, William O'Hara, *then you should find the defendant not guilty.*

Although a party has the right to present his theory of the case to the jury by an instruction, such should not be argumentative, nor should it embody facts not reasonably inferrable from the evidence. The instruction used the word "immediately" three times. Defendant testified that after his motor stalled he used the starter several times in an unsuccessful attempt to get it started again; that the witness Andere approached on foot from the west and upon request used the starter while defendant cranked the motor; defendant then lifted the hood to determine if the motor was getting gas. Andere stated that about ten minutes elapsed from the time he first saw defendant's truck until he heard the crash, at which time he was proceeding east toward Winchester about one hundred to

two hundred feet east of the truck. Defendant states that several trucks passed him going east; he then hailed a west bound truck driven by the witness Roark and asked that his truck be pushed; the latter driver told defendant that he should put out a warning light and handed him a fusee, a small chemical flare which burns about thirty minutes after it is lighted by scratching the surface; defendant states he had fusees in his truck. Both drivers then saw plaintiff's car approaching about a quarter of a mile away. Roark turned his headlights off and on several times by way of warning; defendant says he ran westerly and waved his arms. Defendant states that Roark was there before the accident three or four minutes; that about five minutes elapsed from the time his truck stalled until the time of the accident. Any fair inference to be drawn from the testimony as to the interval between the stalling of the motor and the collision negatives the statement that defendant "immediately" did this or that. The use of an instruction of this type is always subject to the criticism that the jury may get the impression that the court is setting forth its views as to the occurrence. The giving of this instruction amounts to reversible error.

The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

Reversed and remanded.

two hundred feet east of the truck. Defendant states that several trucks passed him going east; he then hailed a west bound truck driven by the witness Roark and asked that his truck be pushed; the latter driver told defendant that he should put out a warning light and handed him a fusee, a small chemical flare which burns about thirty minutes after it is lighted by scratching the surface; defendant states he had fusees in his truck. Both drivers then saw plaintiff's car approaching about a quarter of a mile away. Roark turned his headlights off and on several times by way of warning; defendant says he ran westerly and waved his arms. Defendant states that Roark was there before the accident three or four minutes; that about five minutes elapsed from the time his truck stalled until the time of the accident. Any fair inference to be drawn from the testimony as to the interval between the stalling of the motor and the collision negatives the assertment that defendant "immediately" did this or that. The use of an instruction of this type is always subject to the criticism that the jury may get the impression that the court is setting forth its views as to the occurrence. The giving of this instruction amounts to reversible error.

The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

Reversed and remanded.

45336

NORVIN H. FRANKS, Appellant,	)	APPEAL FROM
v.	)	CIRCUIT COURT
THE GLOBE COMPANY, a corporation, and THE GAMBILL COMPANY, a corporation, Appellees.	)	COOK COUNTY

A

472

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree approving the report of the master and dismissing for want of equity his complaint whereby he sought recovery of the reasonable value of his alleged services in aiding defendants in procuring an order from the Standard Oil Company dated October 25, 1945 for 8,500 farm storage units, and subsequent orders, and a commission of 5 per cent on all sales by defendant of a product found by plaintiff suitable for defendants to manufacture and sell, plus an additional 5 per cent on all orders directly obtained by plaintiff for such product.

The two defendants--one being a holding company owning all of the capital stock of the other--will be treated as a single unit and will hereafter be referred to as the defendant. It was and is engaged in the manufacture of machinery and equipment for the meat packing industry. During the war it manufactured steel tanks for the navy and a hatch beam designed by the industrial research firm of Temple & Franks, in which plaintiff was a partner, for use in Liberty ships. It paid plaintiff's firm $2 per unit manufactured and sold to the government. The use

of the hatch beam was discontinued in February 1945.

Plaintiff's testimony tends to support his claim that in February or March 1945 defendant was interested in securing additional business and a new product to manufacture in its plant; that it offered plaintiff a commission of 5 per cent on all sales made by it of a product found by plaintiff suitable for manufacture by defendant, and an additional 5 per cent on all orders for such product directly obtained by plaintiff. This testimony is contradicted by the president and vice-president of defendant. It appears without contradiction that plaintiff participated in dealings between defendant and the Standard Oil Company resulting in an order dated May 15, 1945 from Standard to defendant for 2,475 300-gallon ground gasoline storage tanks; that 250 tanks were delivered and paid for and the balance of the order canceled; that defendant has tendered and plaintiff has refused to accept $317.28, commission at 5 per cent on the tanks delivered. Negotiations relating to other tanks were had between Standard and defendant. Early in June 1945 plaintiff heard that another company had manufactured a tank for Standard, and plaintiff and defendant discussed the patentability of the tank manufactured by defendant. Defendant's patent attorneys prepared an application for patent by plaintiff, specifications and an assignment of the patent to defendant. Plaintiff refused to assign the patent and submitted a proposed agreement to defendant which it refused to sign and returned to plaintiff. On June

19, 1945 defendant submitted to plaintiff a proposed agreement for his employment as sales manager and as tank distributor for the petroleum industry. This agreement contained a 90-day cancellation clause and a requirement of assignment of patents to defendant. Plaintiff refused to accept this agreement. Except for his demand for commission on the order of May 15, 1945, plaintiff had no further communications with defendant and was not at defendant's plant after June 19, 1945. Immediately thereafter plaintiff was in communication with another company in respect to the manufacture of farmer service stations (gasoline storage tanks), of which he submitted drawings. There is testimony that in August 1945 he stated that he was entirely through with defendant and that he had broken off with it about June 15, 1945. After advertising for competitive bids from various tank manufacturers for a total of 25,000 tanks, Standard Oil Company on October 25, 1945 gave defendant an order for 8,500 tanks, to be prepared in accordance with "our drawings furnished with our inquiry of August 1, 1945, as modified by this order and stipulated herein." The tank ordered was a 300-gallon cylindrical tank elevated on a metal framework with a rack underneath on which two lubricating oil drums might be placed. The contents are withdrawn by gravity flow and no pump equipment is necessary. It bears no resemblance to the tanks built by defendant during its negotiations with Standard, participated in by plaintiff. The burden was on plaintiff to prove his claim by a preponderance of the evidence. The master held that he failed

to establish an agreement, express or implied. The court approved this finding. It is not against the manifest weight of the evidence and cannot be disturbed on review. Fuller v. Cook, 405 Ill. 32, 35.

Objection is made to an allowance to the master in chancery of $15 per hour for 77 hours spent in examination of the pleadings, hearing, and passing upon contested matters, etc. Defendant contends that, the decree having been satisfied in full by the payment of the master's fees directed to be paid to defendant, the amount of the master's fees is a moot question. The payment of the decree did not operate as a release of errors or bar an appeal. Richeson v. Ryan, 14 Ill. 74; Jacksonville Hotel Bldg. Corp. v. Dunlap Hotel Co., 350 Ill. 451, 458. In Klekamp v. Klekamp, 275 Ill. 98, the court said that the per diem compensation of the master "should not, in any event, be equal to or exceed the compensation of the chancellor when reduced to a per diem basis." It was further held that the cost of maintaining the master's office should not be considered in arriving at a proper charge for his services. Similarly the increased cost of living is not a proper element for consideration. In Kerner v. Peterson, 368 Ill. 59, an allowance of $80 per day was held to be grossly excessive. In Handelman v. Arquilla, 407 Ill. 552, the court reduced an allowance of $1720 for 91 hours of work by the master to $1000. Under these holdings the fees allowed by the court are excessive. ~~[illegible] the master has failed to itemize~~

In the decree plaintiff is credited on the costs taxed against him with $317.28, admitted by defendant to be owing him as commission on the order of May 15, 1945. This credit should be allowed plaintiff on the costs to be retaxed as hereinafter directed.

The decree is affirmed except as to that part fixing the master's fees, as to which it is reversed and the cause remanded with directions that the fees be reduced to an amount within the principle stated in the cases cited herein.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

Feinberg and Tuohy, JJ., concur.

45302

HARRY A. ARBOGAST, Appellant, v. THE PENNSYLVANIA RAILROAD COMPANY, a corporation, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT

Plaintiff, an employee of defendant, brought an action against defendant under the Federal Employers' Liability Act and the Federal Safety Appliance Act, to recover damages for personal injuries sustained while in the performance of his duties in interstate commerce. A verdict of not guilty was returned, upon which judgment was entered, and plaintiff appeals.

The interstate commerce character of plaintiff's duties at the time of the accident is not in question. Plaintiff was the conductor of defendant's freight train, consisting of the locomotive and 113 cars, and when it was approaching a highway crossing in Millersburg, Pennsylvania, a motor vehicle became stalled upon the tracks in the path of the train in question. The engineer applied the emergency brakes when 400 feet away from the crossing. The train was going 20 to 25 miles an hour and stopped within 200 feet. The sudden stop and jar threw plaintiff from his sitting position in the cupola of the caboose, resulting in the claimed injuries.

Plaintiff urges that the verdict is against the manifest weight of the evidence, and that the court erred in certain instructions given on behalf of defendant.

The cause was tried upon issues involving the liability of defendant under the Federal Employers' Liability Act and the Safety Appliance Act. On behalf of the defendant the following instructions were given.

> "The defendant and its employees were not required to exercise the highest degree of care to avoid injuring the plaintiff upon the occasion in question but were required to exercise ordinary care and if you believe from the evidence in this case under the instructions of the court that as the train approached North Street in the Village of Millersburg, Pennsylvania it was being operated with ordinary care and that the engineer in charge of the locomotive in question in the exercise of reasonable and ordinary care applied the emergency brakes on the train to avoid a collision with an automobile which stopped on the tracks ahead of said train as soon as it was apparent or ascertainable to him in the exercise of ordinary and reasonable care that said automobile was crossing the track or getting upon or near the track in question in a position of danger then the plaintiff cannot recover in this case.
>
> "If you find from the evidence under the instructions of the court that an unknown motorist drove his automobile out onto the tracks of the defendant and that said motorist stopped his automobile or that the automobile of the said motorist stalled on the tracks on which the train in question was being operated and that if you further find that said motorist was negligent in so driving or causing or permitting his said automobile to stop or stall on said track and that if you further find that such negligence of said motorist was the sole proximate cause of the occurrence in question and the injuries resulting therefrom to the plaintiff, if you find he was injured, then you should find the defendant not guilty."

These were peremptory instructions and under the settled rule in this State must include all of the necessary elements to sustain a verdict. Hanson v. Trust Co., 380

Ill. 194; Kanousis v. Lasham Cartage Co., 332 Ill. App.525. These instructions ignored the issue as to the alleged violation of the Safety Appliance Act. If a violation of the Safety Appliance Act is established, the question of negligence of the defendant does not arise. The liability, if such violation is the proximate cause of the injury, is absolute, and whether or not defendant is negligent does not affect the liability. O'Donnell v. Elgin, Joliet & Eastern Ry. Co., 338 U. S. 384. Under the Federal Employers' Liability Act, negligence of the defendant must be established as the proximate cause, in whole or in part, of the alleged injuries. Eglsaer v. Scandrett, 151 Fed. 2d 562.

The foregoing instructions were highly improper and withdrew from the jury the consideration of the issue as to the Safety Appliance Act.

Since there must be a new trial for the giving of these instructions referred to, we shall not discuss the question as to whether the verdict was against the manifest weight of the evidence.

The judgment of the Superior Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Niemeyer, P. J., and Tuohy, J., concur.

45364

A

474

DR. A. I. DOKTORSKY and MRS. A. I. DOKTORSKY, his wife, Appellees,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
MARTIN M. LEVITT, Appellant.	343 I.A. 465

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action against defendant to recover damages for alleged fraud and deceit in securing possession of the apartment occupied by plaintiff in the building owned by defendant, alleging special damages resulting from the alleged fraud. There was a verdict for plaintiff in the sum of $1500, and judgment was entered thereon, from which defendant appeals.

It appears from this record that plaintiff, a physician by profession, was a tenant of defendant in a building owned by him on Euclid Avenue in Chicago; that sometime in December, 1946, defendant communicated with plaintiff and advised him that it was necessary for him to have possession of the apartment for his daughter, who was being married to a war veteran and in urgent need of housing accommodations; that defendant on December 1, 1946, filed a petition with the Housing Expediter under the Federal Rent Control Act, seeking a certificate authorizing eviction of plaintiff from the apartment in question; that plaintiff presented his opposition to such a certificate to the Housing Expediter, which resulted in a denial of defendant's

petition for such a certificate; that the reason assigned by the Housing Expediter in his order was that the petition of defendant was "inconsistent with regulations." On December 26 defendant again filed a petition with the Housing Expediter for such a certificate. Plaintiff again filed his opposition with the Housing Expediter, and after a hearing the Housing Expediter issued his certificate to defendant authorizing him to proceed with his remedy to recover possession of the premises, which certificate provided that no action should be commenced to evict plaintiff until after April 27, 1947. In the interim plaintiff's father-in-law, who owned a building on Yates Avenue, petitioned the Housing Expediter for a certificate authorizing eviction of a tenant in an apartment in the Yates Avenue property, assigning as a need for the certificate that plaintiff, his son-in-law, required housing accommodations for himself, his wife and children. Plaintiff, in a letter to the Housing Expediter, dated February 14, 1947, to support the petition of his father-in-law for the certificate of eviction covering the Yates Avenue property, wrote:

> "If my father-in-law's petition were revoked and he were issued a certificate of eviction for the flat at 7336 Yates I would gladly move there, and release my present apartment."

The Housing Expediter issued a certificate of eviction for the Yates Avenue property, which was followed by forcible detainer proceedings started by plaintiff's father-in-law, who secured judgment for possession of an apartment in the Yates Avenue property. Plaintiff thereupon

moved out of his apartment in the Euclid Avenue property owned by defendant and moved into the Yates Avenue apartment. Plaintiff moved without any forcible entry and detainer proceedings against him. It also appears that defendant's daughter did not move into the Euclid Avenue property but took an apartment in another building owned by defendant. This is the basis for the charge by plaintiff that defendant did not in good faith make claim for the need of plaintiff's apartment in the Euclid Avenue property; that defendant obtained the certificate from the Housing Expediter in bad faith; that plaintiff was compelled to lose considerable income in his profession due to the time consumed in searching for other housing accommodations and in the moving process; that defendant's conduct was a fraud upon his rights. The evidence further discloses that defendant's daughter was unable to wait for the apartment occupied by plaintiff due to the delay, and moved into an apartment in another building owned by defendant.

The proceeding before the Housing Expediter was under the U. S. Emergency Price Control Act of 1942 and rent regulations thereunder. Under that Act the landlord's good faith in procuring the certificate of eviction was exclusively in the jurisdiction of the local rent director. Isman v. Cohen, 341 Ill. App. 348, 352. The 1947 Rent Control Act was passed after the proceedings in question and did not apply to the instant proceeding before the Housing Expediter. Under the provisions of the 1947 Housing and Rent Act the question of the good faith of the

landlord was left for the courts in forcible entry and detainer proceedings. Mikkelsen v. McDonald, 333 Ill. App. 518; Barsanti v. Jacobsen, 337 Ill. App. 79. The 1949 amendment to the Housing and Rent Act of 1947 again restored the exclusive jurisdiction of the Housing Expediter upon the question of the landlord's good faith. Isman v. Cohen, supra. Since the 1942 Rent Control Act applied to the instant proceeding before the Housing Expediter, he had the exclusive jurisdiction to determine the good faith of the defendant in securing the certificate of eviction for plaintiff's apartment in the Euclid Avenue property. He afforded both parties a full opportunity to be heard, and his determination of the good faith of the defendant should be controlling. Isman v. Cohen, supra. There was no appeal from the finding of the Expediter as provided in the Rent Control Act. Under the circumstances we must regard plaintiff's moving from the Euclid Avenue property as voluntary, there having been no forcible detainer proceedings instituted against him by defendant. In fact, in his letter to the Housing Expediter, as already noted, he wrote he would "gladly move" from the Euclid Avenue apartment if the Expediter would grant a certificate to plaintiff's father-in-law for an apartment in the Yates Avenue property. The alleged fraud of defendant must, like any other fact, be proven by clear and convincing evidence. Plaintiff had the burden of proof, which he failed to sustain. Racine Fuel Co. v. Rawlins, 377 Ill. 375, 379; Parker v. Dameika, 372 Ill. 235, 239.

Other questions raised by defendant we deem unnecessary to discuss. Plaintiff has no cause of action upon the facts presented, and the judgment of the Superior Court is reversed.

REVERSED.

Niemeyer, P. J., and Tuohy, J., concur.

45429

E. J. BIGGS, individually and as the assignee of the E. J. Biggs Construction Co., a corporation, Appellant,	APPEAL FROM
v.	SUPERIOR COURT,
ANTON PLEBANEK, VICTORIA PLEBANEK, JOHN BARA, ELEANOR BARA, and the CHICAGO TITLE & TRUST CO., Appellees.	COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff E. J. Biggs, individually (hereinafter for convenience referred to as Biggs), and as assignee of the E. J. Biggs Construction Company (hereinafter referred to as the company), filed this action against defendants to enforce an alleged mechanic's lien. The complaint and amended complaint were on motion stricken, and plaintiff elected to stand on the amended complaint. A motion for summary judgment by plaintiff was denied. This appeal is from the orders striking the amended complaint, dismissing the cause with judgment for costs against plaintiff, and the denial of the motion for summary judgment.

The amended complaint, which except for one sentence is a duplicate of the original complaint, also stricken, had attached to it, as an exhibit, a notice of lien filed with the clerk of the Circuit Court. The notice designates Biggs as the claimant, asserting therein that the claimant made a contract with the owners for the work and material and that extra and additional work and material were furnished. The notice was signed "E. J. Biggs Construction

Company, E. J. Biggs." The complaint alleged that Biggs purchased the chose in action from the company for $1.00 and other good and valuable considerations; that plaintiff was engaged in the business or occupation of general contractor in the City of Chicago, and on January 30, 1946, plaintiff entered into a written contract with two of the owners of the premises described in the complaint.

Biggs filed the action and prosecutes this appeal pro se. He is not licensed to practice law, and his endeavor in the present action follows the pattern pursued by him in Biggs v. Schwalge, 341 Ill. App. 268, decided by this court (Second Division). The opinion makes clear that he has made it a practice of taking assignments from the company in more than one instance, so that he could by the device of such assignment prosecute the suit individually and thus persist in practicing law without a license, a purpose condemned in People v. Tinkoff, 399 Ill. 282, wherein the court said:

> "Any person who has an interest in a matter to be litigated in the courts has the right to appear in his own behalf and protect his own interests so long as he proceeds in accord with rules of practice and procedure.
>
> " * * *
>
> "The purported assignments of interest in litigations to respondent's minor son were a subterfuge employed by respondent for the purpose of deceiving the court as to the real parties in interest and to provide a devious procedure by which he thought he could nullify the order of this court disbarring him and striking his name from the roll of attorneys.

> The practice of law, both in courts and out of courts, by one not licensed, is an illegal usurpation of the privilege of an attorney and is contempt of this court."

The complaint fails to disclose the right of Biggs to sue individually as well as assignee. He alleges he performed the work and furnished the material, yet the notice of lien attached to the complaint as an exhibit, and which under section 36 of the Practice Act becomes a part of the pleading for all purposes (Morris v. Broadview, 338 Ill. App. 99), is in the name of the company. It is entitled E. J. Biggs Construction Co. v. Anton A. Plebanek, et al. Obviously, the company did the work and was, in reality, the claimant for the lien; otherwise the company would not have had a chose in action for this work and material, which, the complaint alleges, Biggs purchased and became assignee.

Other imperfections in the complaint appear, which we deem unnecessary to detail. The court was also justified in denying the motion for summary judgment while a motion to strike the complaint was pending, which the court sustained.

The brief contains rambling statements of denial of Biggs's constitutional rights, imaginary, rather than real. It is unfortunate that a claim for mechanic's lien, which might have merit if properly presented, should be jeopardized by the insatiable desire of Biggs to practice law and his inability to know the fundamentals required in the prosecution

of such a claim.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Niemeyer, P. J., and Tuohy, J., concur.

45350

MORRIS SCHWARTZ, HENRY SCHWARTZ, FANNY SCHWARTZ, and HERMINE SCHWARTZ, a co-partnership doing business as BARREL FITTING AND SEAL COMPANY, Appellants,	APPEAL FROM
v.	CIRCUIT COURT
AMERICAN FLANGE & MANUFACTURING COMPANY, a corporation, Appellee.	COOK COUNTY

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued at law to recover for breach of contract based upon defendant's failure to buy plaintiffs' business for the sum of $60,000. From a judgment for defendant entered by the Circuit Court of Cook County in a trial without a jury, plaintiffs appeal.

Plaintiffs, prior to February, 1946, were a co-partnership consisting of Morris Schwartz, his wife Fanny, his son Henry, and his daughter Hermine. The business was located at 919 South Keeler Avenue, Chicago, Illinois. Defendant is an Illinois corporation with executive offices in New York City, and a factory in Chicago. The concerns were competitive. In the early part of April, 1946, a telephone proposal was made by plaintiffs, through Henry Schwartz, to defendant for the sale of plaintiffs' company. On May 17, 1946, defendant, by John Myers, its secretary and general manager, sent Henry Schwartz the following telegram:

> "THIS IS TO CONFIRM OUR UNDERSTANDING JUST REACHED OVER THE TELEPHONE THAT YOU WILL SELL AND WE WILL BUY ALL THE ASSETS OF THE BARREL FITTING AND SEAL COMPANY OUTRIGHT FOR SIXTY THOUSAND DOLLARS

> AND YOU WILL ARRANGE FOR A LEASE OF THE PREMISES FOR ANOTHER YEAR SUCH LEASE TO BE TRANSFERRED TO US. OUR CHICAGO ATTORNEYS WILL GET IN TOUCH WITH YOURS TO TAKE CARE OF FORMALITIES."

On May 17, 1946, Henry answered defendant's wire by telegram as follows:

> "YOUR WIRE CORRECT WITH UNDERSTANDING THAT ACCOUNTS RECEIVABLE AND BILLS PAYABLE EXCLUDED. ALSO SELLER IS BARREL FITTING AND SEAL COMPANY A CO-PARTNERSHIP AND NOT A CORPORATION STOP WHILE LEASE NOT TRANSFERABLE WITHOUT LANDLORD'S CONSENT ANTICIPATE NO TROUBLE ON THIS SCORE."

No reply was received by Schwartz from Myers to his telegram. Considerable correspondence between the attorneys for the respective parties followed extending over a number of months and various documents were prepared, indicating that the attorneys were attempting to conclude the deal. It not having been concluded on July 17, 1947, plaintiffs' attorneys wrote defendant threatening suit and suggesting compromise. On August 5, 1947, defendant wrote plaintiffs' attorneys acknowledging receipt of the letter of July 17th and definitely terminating negotiations.

Plaintiffs' theory of the case is that there was a binding contract made between the parties, confirmed in writing by plaintiffs' and defendant's telegrams of May 17th. Defendant contends (1) that there was no meeting of the minds on the essentials of the contract and consequently no agreement between the parties, and (2) that there was no sufficient memorandum in writing of the alleged agreement to take it out of the statute of frauds.

The answer to the questions raised lies for the most part in the meaning to be given the telegrams of May 17th. The wire from defendant to plaintiffs purports to be a confirmation of an understanding reached over the telephone that plaintiffs would sell and defendant would buy "all the assets of the Barrel Fitting and Seal Company outright for sixty thousand dollars." The answer from plaintiffs to defendant, to the effect "your wire correct with understanding that accounts receivable and bills payable excluded * * *," was not an acceptance or acknowledgment of the correctness of defendant's telegram. On the contrary, it was a statement that defendant's telegram was incorrect insofar as it had failed to exclude accounts receivable and bills payable. Based upon these two documents alone it appears that there was no clear understanding as to the oral agreement alleged to have been made some days before.

As indicating that a binding agreement had been reached by the parties, plaintiffs cite a letter of May 23rd, written by an attorney representing defendant to the attorney representing plaintiffs, in which the writer states, "I understand that the basic terms set forth in these telegrams are acceptable to both parties." The letter recites a number of details which were necessary to conclude the deal. The following pertinent language then occurs: "From what you said today, I understand that the accounts receivable run between $1800 and $1900 and that the present inventory will not be disturbed. Of course accounts receivable

are excluded from the deal, as are the bills payable, and I understand those bills are only small items." Counsel argue that this language in this letter was an acknowledgment of plaintiffs' offer to sell and defendant's agreement to purchase subject to exclusion of accounts receivable. This conclusion, however, overlooks the final paragraph in this letter which is as follows: " * * * Of course our respective clients will want to pass on the papers before they sign on the dotted line." Viewing this letter as a whole, we conclude that it was an invitation from defendant's lawyer to plaintiffs' lawyer to get together all the original papers pertaining to the title to the properties and to prepare assignments, bills of sale and protective covenants whereunder all the assets, including patents, trade-marks, physical assets and orders on hand would be assigned to the defendant, excluding accounts receivable and bills payable; that when all these papers were prepared defendant's lawyer would submit them to his client and if satisfactory to the client the agreement would be made.

Subsequently papers were prepared. The bill of sale, signed by plaintiffs but never delivered to defendant, which was prepared by plaintiffs' lawyer, exhibit No. 15, excluded not only accounts receivable but cash as well, the latter being an item which, so far as the record discloses, had never been discussed between the parties. Plaintiffs were obligated to prove this agreement by a preponderance of the evidence. The negotiations carried on after the

May 17th telegrams do not aid plaintiffs to support this burden.

The cases cited by plaintiffs are not helpful in determining the issue here presented, for the reason that the legal principles are not in dispute; it is rather the interpretation to be placed upon the undisputed facts that causes the difficulty. Plaintiffs cite the case of Staackman, Horschitz & Co. v. Cary, 197 Ill. App. 601, where the plaintiffs in Antwerp, Belgium, had made defendant in America an offer by telegram as follows: "Make you firm offer 1200 * * * bankers guaranteeing contract," to which defendant replied by telegram: "We accept your offer * * *." The court, in determining these two telegrams to constitute a contract, said (p. 604):

> "The telegrams made a contract between the parties to be interpreted in the light of the usages of trade and the previous telegrams between the parties. It is true that an offer must be accepted as made, for any modified acceptance is but a new offer and cannot be the basis of a contract until it in terms has been accepted unconditionally. The words 'we accept' in defendant's telegram of March 14th, followed by enough of the offer to identify it, was an acceptance of the offer in its entirety. The mere fact that the reduction of an informal agreement, oral or written, by a formal written one was contemplated or stipulated for, does not prevent the former from taking immediate effect. The question whether it does or not depends on what the parties intended."

The Staackman case, far from being authority for plaintiffs' contention, lends support to defendant's position, because in the instant case the offer was not accepted as made, but was a modified acceptance which

constituted a new offer. Defendant's telegram of May 17th in the instant case cannot be held to have constituted an offer which had been "accepted unconditionally."

Furthermore, in order to meet the requirements of the statute of frauds, the terms of the oral agreement between the parties must have been set forth in some note or memorandum in writing signed by the defendant or its agent in its behalf. The writing relied upon under the pleadings and in answer to defendant's interrogatory No. 9, which specifically called for discovery of all writings upon which plaintiffs relied insofar as the statute of frauds defense was concerned, was the telegram of May 17, 1946. From what we have said above, we are of the opinion that the telegrams of May 17th did not constitute a sufficient memorandum of an oral contract.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Niemeyer, P.J., and Feinberg, J., concur.

45345

VICTORIA LASZLO and EDWARD LASZLO, Appellees,	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	)	
SAM H. TERAO, Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The defendant Sam H. Terao appeals from a decree of the Circuit Court enjoining him until March 14, 1954 from engaging in and continuing to operate a restaurant, delicatessen and grocery business located at 1027 West Argyle street in Chicago in violation of a negative covenant contained in the bill of sale of a like business at 1012 West Argyle street, Chicago, evidencing the sale by Terao of that business to one Leo Osher who in turn sold the restaurant to the plaintiffs Victoria and Edward Laszlo.

There is substantially no dispute as to the essential facts. Prior to March 14, 1949 Terao held himself out as the sole owner and proprietor of a restaurant business known as Ida's Restaurant and Delicatessen, located at 1012 West Argyle street. This is evidenced by photostatic copies of monthly sales tax returns made by Terao commencing in January 1947 and continuing until March 14, 1949, and by city food dispenser's licenses issued to Terao for the years 1947 and 1948.

On March 14, 1949 Terao sold this going business to Leo Osher, to whom he delivered a bill of sale conveying specific items of fixtures, equipment "and all the rest

of the Stock and Merchandise on hand, good will, and right to use the name of Ida's Restaurant and Delicatessen, and right to use the 'Phone number known as LOngbeach 1-9585 which will be assigned to Seller by Buyer, and any and all goods, wares, and merchandise in the premises * * *." The bill of sale also contained the provision that the "party of the first part [Terao] * * * agrees that he will not directly or indirectly engage in the business of restaurant delicatessen and groceries within a radius of 6 blocks of 1012 Argyle Street, Chicago, Illinois, for a period of five (5) years from date hereof. To have and to hold the said Goods, Chattels and Property unto the said party of the second part [Osher], his heirs, executors, administrators and assigns, to and for his his own proper use and behalf, forever." The final paragraph in the rider provided: "It is further understood and agreed that the sales price includes all of the good-will, existing stock of merchandise, and chattels specifically enumerated in the Bill of Sale, and situated in the store at 1012 West Argyle Street, Chicago, Illinois." On the same day that Terao conveyed the business to Osher by bill of sale, the latter entered into a lease for the store for a period of three years ending March 1, 1952. The consideration for the sale of the restaurant business by Terao to Osher was $7000, $4000 of which was paid in cash by Osher to Terao, and $3000 of which was represented by a chattel mortgage. Terao had conducted the restaurant business at 1012 West Argyle street

for four and one-half years prior to the sale; after the sale Osher continued the restaurant and delicatessen business which he had thus purchased.

Subsequently, on September 2, 1949, Osher sold the restaurant business to Victoria and Edward Laszlo for $6500. Osher executed and delivered to plaintiffs his bill of sale which conveyed to them specified items of store fixtures and equipment and all "goods, wares and merchandise contained upon the premises * * *. All of the right, title, and interest of Leo Osher as lessee in and to a certain lease from the Liberty National Bank of Chicago, trustee under Trust No. 6352, Lessor, dated March 14, 1949, together with the right of the said Leo Osher in and to a certain deposit in the sum of Two Hundred Twenty-Five Dollars ($225.00) remitted by him to the said lessor; goodwill in conjunction with the operation of the said Ida's Delicatessen and Restaurant business, at 1012 West Argyle Street, Chicago, Illinois." This bill of sale also contained the following provision: "It is expressly understood and agreed that Leo Osher, the seller herein, and his mother, Rebecca Osher, will not engage, directly or indirectly, or be directly or indirectly employed at or in the delicatessen or restaurant business within a radius of one mile from 1012 West Argyle Street, Chicago, Illinois, for a period of five years from the date hereof." At the same time Osher assigned his interest in his lease to the Laszlos, and on the same day the lessor of the lease consented to the assignment. To consummate

the transaction Osher gave Terao his check for $1750 payable to Terao, which was endorsed by Terao and deposited in a savings account that he had with his sister Kimi Terao in the Uptown Bank of Chicago.

In less than two months thereafter, on October 26, 1949, Terao was named as the vendee in a bill of sale from Leonard Minck and Sidney Haberman of all fixtures and equipment used in the operation of another restaurant and delicatessen business at 1027 West Argyle street. The consideration for that purchase was $10,142. The 1027 West Argyle street business is on the south side of West Argyle street and less than a block away from Ida's Delicatessen and Restaurant at 1012 West Argyle street. It thus appears that Terao in his own name acquired the interest of the lessees Minck and Haberman to the store premises at 1027 West Argyle street for the remainder of the term of the lease obtained by the original lessees Minck and Haberman which expires September 30, 1952. Still later, on January 16, 1950, Terao in his own name filed an application with the Retailers Occupational Tax Division of the Department of Revenue of the State of Illinois for a transfer of his prior registration at 1012 West Argyle street to 1027 West Argyle street. Shortly prior thereto, on December 8, 1949, Terao in his own name had filed with the office of the City Collector an application for a food dispenser's license for the store at 1027 West Argyle street, and in connection with this new location had filed an appli-

cation for telephone service and for electric light to be furnished by the Meter Service Company in which he held himself out to be the proprietor. The new restaurant at 1027 West Argyle street was carried on under the trade name of Lakeview Restaurant and opened for business the first week in December 1949. In his sales tax returns on the Lakeview Restaurant for the months of December 1949 and January through April 1950 inclusive, Terao always described himself as "sole owner."

The complaint herein was filed April 6, 1950. At the beginning of the trial Terao amended his answer by averring that "he and his father, mother and sister are operating a restaurant at 1027 Argyle Street, Chicago, Illinois, which they purchased with their own funds, under the name of Lakeview Restaurant * * *." Pursuant to hearing the chancellor, on June 29, 1950, entered a decree finding that the equities were with plaintiffs and enjoining "Sam H. Terao, his agents and servants, * * * from engaging in and continuing to operate the restaurant, delicatessen and grocery business now located at the store premises at 1027 West Argyle Street, Chicago, Illinois until March 14, 1954 * * *."

As the principal ground for reversal Terao contends that since covenants in restraint of trade are not favored, the party complaining of an infraction will be held to a strict interpretation of the language of the instrument; and it is argued that since the bill of sale merely conveyed

"good will," along with fixtures, equipment and other items of property, without specifically stating that the good will of the business was included, such a conveyance would not support the enforcement of the negative covenant in both bills of sale. There is no merit to this contention. As heretofore pointed out, the terms of the bill of sale specifically conveyed the "good will" of the restaurant, and the rider to the bill of sale stated that "the sales price includes all of the good-will, existing stock of merchandise, and chattels specifically enumerated in the Bill of Sale." The term "good will" could not well refer to anything but the good will of the business, but even if both bills of sale had omitted any specific reference to good will, the conveyance of the good will of the restaurant business in both sales would necessarily follow as an integral part of the transactions. Public Opinion Pub. Co. v. Ranson, 34 S.D. 381, 148 N.W. 838, and decisions cited therein; 38 C.J.S., Good Will, sec. 8 (p. 955, note 78); 24 Am. Jur., Good Will, sec. 13 (p. 810, notes 10 and 11). In the case at bar both bills of sale conveyed the assets of going businesses that were in existence at the respective times they were executed. On the very day that Terao executed and delivered his bill of sale to Osher, the latter obtained a new store lease for the premises at 1012 West Argyle street, and when Osher executed and delivered his bill of sale to plaintiffs, Osher's lease was assigned to the Laszlos with the consent of the lessor. Accordingly when both sales

were made, part of the transactions embraced the unbroken continuance of the restaurant business at 1012 West Argyle street, and both transfers contemplated that both purchasers could procure a continuance of the lease arrangements of the store. Under the circumstances the argument of defendant that "good will has no existence except in connection with a continuing business" is beside the point. Inasmuch as we have concluded that the good will of the business passed with both bills of sale, it follows under the great weight of authority that plaintiffs have the right to enforce the negative covenant which protected them in acquiring the restaurant business at 1012 West Argyle street for a valuable consideration. The purpose of such a covenant is to protect the purchaser in the enjoinment of the business and its good will. It is not personal but inures to the benefit of the one to whom it is assigned with the business (20 Cyc. 1281), and where the business is transferred the agreement not to compete goes with it, even though not specifically mentioned. Palmer v. Toms, 96 Wis. 367, 71 N.W. 654; Knowles et al. v. Jones et al., 182 Ala. 187, 62 So. 514; Public Opinion Pub. Co. v. Ranson, 34 S.D. 381, 148 N.W. 838; Bauwens et al. v. Goethals, 187 Ill. App. 563. Terao deliberately violated the terms of his written negative covenant which we hold to be reasonable and enforcible. The chancellor properly entered a decree enjoining him from engaging in the restaurant business within a prescribed area until the expiration of the period designated in the

negative covenants, and accordingly the decree is affirmed.

We think the points herein discussed are controlling, and therefore other points need not be considered.

Pending this appeal, defendant moved to dismiss the appeal as being moot. He suggested that the place of business acquired by the Laszlos was closed and was not being actively operated as a restaurant. The Laszlos showed by affidavit that the opening of the competing restaurant at 1027 West Argyle street by Terao so infringed on their business as to cause severe losses running into many thousands of dollars, and that since Terao was permitted to continue the conduct of his new restaurant in violation of his negative covenant, the Laszlos were unable to absorb the losses incurred and continue to operate the restaurant which they had purchased. On May 25 defendant moved to reconsider our former ruling to reverse the decree as being moot; that motion is hereby denied.

For the reasons indicated the decree of the Circuit Court is affirmed.

Decree affirmed.

Schwartz, P. J., concurs.

45254

H. R. RATHBUN, doing business as JOHNSEN AND RATHBUN, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT
JOSEPH HAGN, JR., MURIEL HAGN and MARTHA M. SMITH, Appellees.	)	COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On July 28, 1948, H. R. Rathbun, doing business as Johnsen & Rathbun, filed a complaint at law in the Superior Court of Cook County against Joseph Hagn, Jr., Muriel Hagn and Martha M. Smith, alleging that he was a licensed real estate broker; that he was engaged by Martha M. Smith to sell real estate at 520 Brierhill Road, Deerfield, Illinois; that he advertised the property for sale; that thereafter he showed it to Joseph Hagn and Muriel Hagn; and that because of the other matters alleged he became entitled to receive a commission of $2,000. He asked judgment for that amount against the defendants or such of them as "breached said contract of sale." Answers and a counterclaim were filed. On December 15, 1949, by leave of court, the defendants amended their answers to the complaint to allege that plaintiff, at the time of the transaction, was operating his business in violation of an act in relation to the use of an assumed name in the conduct or transaction of business in this State, (Pars. 4, 5, 6a, 7 and 8, Ch. 96, Ill. Rev. Stat. 1949); and that he was operating as an individual under the name, style and description of "Johnsen and Rathbun," without having filed the requisite certificate

with the County Clerk as required by the statute.

Plaintiff, in a reply to these amendments, denied that his operation was in violation of the statute and stated that no fictitious name was used by him; that the defendants at all times knew with whom they were dealing; that the contract being executed the defendants are estopped from attempting to evade the same; that until December, 1947, plaintiff, with Sigwald Johnsen, operated under the name of Johnsen & Rathbun; that about December 1, 1947, Johnsen retired from active participation in the business with the understanding that the business would continue under the firm name until all transactions made up to the time of such retirement were fully consummated; and that all transactions of the partnership of Johnsen & Rathbun were not consummated until early in 1949. On March 8, 1950, defendant moved to strike the reply of plaintiff and enter judgment because it affirmatively appeared therein that plaintiff at the time of the happening of the events set forth in the complaint was operating under an assumed name and that no filing or registration of the name was made, in violation of the assumed name act. The court struck the reply and entered judgment for the defendants. Plaintiff's motion to vacate the judgment was denied on April 4, 1950. A further motion by plaintiff to modify the order of April 4, 1950, was denied on May 1, 1950. Plaintiff appealed.

The only point raised on this appeal is whether the plaintiff's reply to defendants' amended answer was properly stricken by the court. Defendants' theory is that plaintiff's reply was properly stricken because he admittedly

failed to comply with the assumed name act. Since the filing of the instant apeal our Supreme Court has decided against the contention of defendants in the case of Grody v. Scalone, 408 Ill. 61, 96 N. E. (2d) 97, where the court said (66):

"It was said in the case of Hayes v. Providence Citizens' Bank and Trust Co., 218 Ky. 128, 290 S. W. 1028, (the whole court sitting) where the statute imposed a penalty of a fine or imprisonment but did not expressly impose any further penalty, 'This is a potent indication of a legislative purpose that the penalty expressed should be exclusive. The purpose of the penalty is to secure obedience to the statute to the end that its object may be accomplished. But the object of the statute, as above stated, is certainly not accomplished or even furthered by adding to the penalty expressly imposed the additional one of the loss of goods, chattels, or services sold or performed by one doing business in violation of the statute. Such a cumulative penal result is scarcely commensurate with the evil sought to be remedied. A cursory reading of our Statutes discloses that, when the Legislature intended such a cumulative penalty, it was careful to expressly say so.' In the instant case, the legislature provided for no cumulative penalty."

Therefore, the judgment of the Superior Court of Cook County is reversed and the cause is remanded with directions to proceed in a manner not inconsistent with the views expressed.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.

453 A

45261

A. KENNETH PAUL, Plaintiff - Appellant, v. SAM ROSEN, doing business as S & R Liquors, Defendant - Appellee.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

342 I.A. 516

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a statement of claim filed November 9, 1948, in the Municipal Court of Chicago, A. Kenneth Paul asked judgment in the sum of $2,500 against Sam Rosen, doing business as S & R Liquors, as liquidated damages, provided for in an agreement dated June 22, 1948. Issue was joined. The case was tried before the court and six jurors. After the proofs had been closed the court granted plaintiff's motion to withdraw a juror and the case was continued. Thereafter, plaintiff filed a motion for a summary judgment based on a transcript of the proceedings at the trial. Defendant filed an opposing affidavit claiming that the breach of the agreement was the fault of plaintiff and that there was a cancellation of "any agreement between the parties." The court denied plaintiff's motion for a summary judgment and sustained defendant's motion for a summary judgment. Plaintiff appeals.

By the contract of June 22, 1948, defendant agreed to sell to plaintiff the good will, fixtures, equipment, stock in trade and liquors in a warehouse of the retail package liquor store at 2354 West Madison Street, Chicago. Dr. Alexander H. Mall, an uncle of plaintiff, initiated the negotiations. Plaintiff, Dr. Mall and another nephew of

Dr. Mall, Seymour Hirschfield, were interested in the purchase. Morris Pinchouck was the owner of the real estate where the store was located. He and defendant had a lease. The record does not show when the lease would terminate. The agreement was contingent upon plaintiff obtaining a new lease on the premises for a period of five years from "June or July 1, 1948," at a rental of $350 per month, with a renewal option for three years at $400 per month. The agreement stated that "such lease may call for the deposit by the lessee of $2,000 as security thereon," and provided that the new lease, when secured, should be deposited with I. Archer Levin in escrow, to be "retained by him until this deal is fully consummated, as herein provided, at which time he shall deliver said lease to the buyer on cancellation of seller's present lease on said premises," and that nothing therein should affect the seller's rights under the existing lease "unless and until this deal is consummated as herein provided." The seller agreed to pay to the lessor of the premises the sum of $520 as consideration for the execution by him of the new lease.

The amount to be paid for the good will, fixtures, stock in trade and warehouse merchandise depended upon the inventory to be taken beginning on June 27, 1948. After executing the contract the parties agreed to meet at defendant's place of business a few days prior to June 27, 1948, to take the inventory. The plaintiff and others went to defendant's place of business at 10:30 P.M. on the appointed day and informed defendant that he was ready to

take the inventory. Defendant stated to plaintiff that he could not proceed with the inventory because one of his bartenders was ill and requested plaintiff to return the following Sunday at midnight, the date specified in the contract. Plaintiff left. He returned to the store at midnight on June 27, 1948. Defendant introduced testimony that at the first meeting for the purpose of taking the inventory he made inquiry of plaintiff as to whether the latter had a lease, as provided by the agreement and was met by a negative answer. Plaintiff was then told that he could return on the following day at midnight to take an inventory provided that he then had a lease; that plaintiff returned the next day without a lease and defendant refused to permit the taking of the inventory even though he had provided extra help for that purpose; that about 30 days thereafter the parties met at the office of Mr. Levin, the attorney for defendant and also the escrowee, when defendant offered to revive the deal; that plaintiff demanded the return of his $2,500; and that the money was returned to the plaintiff.

Plaintiff, asking that the judgment be reversed and that judgment be entered in his favor, relies on the rule that where a party to a contract makes known his intention not to perform, the other party is not required to do anything further to perform the contract, but may treat it as breached and bring immediate action to recover his damages, citing Foreman State Bank v. Tauber, 348 Ill. 280; Kinnan v. Hurst Co., 317 Ill. 251; Lake Shore & Michigan Southern Ry.Co. v. Richards, 152 Ill. 59; and McPherson v. Walker, 40 Ill.371.

The purpose of a summary judgment is to ascertain whether there is an issue of fact to try. Defendant maintains that plaintiff did not make an effort to obtain a lease on the premises. Defendant alleged as a fact that the landlord would not give plaintiff a lease. The agreement contemplated that the deal should be consummated and possession given to the buyer on or before July 7, 1948. The agreement was conditioned upon the buyer obtaining a new lease, which was to be deposited with Mr. Levin in escrow. Plaintiff states that the condition that plaintiff obtain a new lease was for his benefit and not for the benefit of the defendant. While plaintiff was vitally interested in obtaining a new lease, defendant was also interested as he wanted to be released from his obligation under the old lease. Defendant also was interested in having plaintiff in possession of the store under a lease for a definite term as that would increase the financial responsibility of plaintiff in paying the balance of the purchase price. Under the circumstances presented by the testimony shown in the transcript of proceedings, we do not feel that we can, as a matter of law, say that the contract was breached by the defendant when he refused to go ahead with the taking of the inventory and that therefore plaintiff was not required to do anything further to perform his part of the bargain. The evidence, viewed in its aspect most favorable to the defendant, shows that the parties considered production of the new lease an essential step in the closing of the deal. There was testimony on the part of defendant that when the plaintiff came

to take the inventory he raised the question of the production by plaintiff of a new lease. In our opinion the cases cited by plaintiff are not applicable to the situation presented by the record. We are of the opinion that neither plaintiff nor defendant is entitled to a summary judgment.

In the trial court defendant contended that there were sufficient facts in dispute to permit the case to be tried by a jury. We agree with this contention. The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for further proceedings not inconsistent with the views expressed.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.

454

45286

ANNA JULIANO, et al., Plaintiffs, v. FRED FEIBEL, JR., et al., Defendants and Counter-Plaintiffs below, Appellees,	APPEAL FROM SUPERIOR COURT COOK COUNTY.
On Appeal of FRANK VOTAVA, Plaintiff and Counter-Defendant below, Appellant.	343 I.A. 317

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Anna Juliano, Frank Votava and Emily Votava, his wife, filed a complaint in chancery in the Superior Court of Cook County against Fred Feibel, Jr., and Emma M. Feibel, his wife, to remove a cloud upon the title of improved real estate commonly known as 6303 Ogden Avenue, in the City of Berwyn, the alleged cloud consisting of a written agreement dated October 10, 1948, wherein Frank Votava agreed to sell the real estate to the Feibels and which agreement was recorded by the latter in the Recorder's Office of Cook County on February 18, 1949. The complaint alleged that on October 16, 1948, the defendants notified the vendor that they would not perform their obligations under the contract; that on February 7, 1949, the vendor entered into a written contract with Anna Juliano for the sale of the same realty; and that on June 6, 1949, the Votavas conveyed

the realty by warranty deed to Anna Juliano. The defendants, answering, denied that the vendor tendered performance of his obligations under the contract. They denied that the contract "is a cloud on the title of the property involved herein, but that on the contrary it is a legal and binding contract entered into by plaintiff Frank Votava and these defendants."

In a counterclaim defendants represented that they paid earnest money of $500 to Frank Votava; that the contract required that within 20 days from the date thereof the seller "shall deliver to the buyer or his agent" an owners guarantee policy of the Chicago Title & Trust Company or its customary preliminary report on title; that at no time had the vendor delivered to defendants or their agents such guarantee policy or preliminary report; that such a report was necessary "in order to obtain financing of the property"; that though demand was made for such report, vendor failed to furnish it; that vendor offered the real estate for sale to the public; that he sold it to Anna Juliano; that by the failure of vendor to comply with the terms of the agreement, defendants were deprived of an opportunity "to complete the contract and financing thereof"; and that vendor has refused to return the deposit. They asked that the vendor "be ordered to repay earnest money of $500" plus such damages as the court may determine. In an answer to the counterclaim plaintiffs denied that the vendor failed to deliver on demand any title reports required under the contract and stated the fact to be that the contract was breached by the defendants;

that vendor offered to carry out his contractual obligations but that defendants refused to do so; that it was not until the vendees informed the vendor of their intention to breach the contract that the former was compelled to send to them a notice of termination and forfeiture and to put the property up for sale in order to prevent damage and loss. A trial before the chancellor resulted in a decree declaring the contract "null and void" as against Anna Juliano, her heirs and assigns, and removing it as a cloud upon the title to the real estate. The decree gave judgment on the counterclaim in favor of defendants and against plaintiff Frank Votava for $500. Frank Votava, appealing, asks that the judgment be reversed and that judgment be entered against the defendants on their counterclain.

Under the written agreement of October 10, 1948, the vendor agreed to sell and the vendees agreed to purchase the realty for $10,800. Votava agreed to "convey or cause to be conveyed" to the buyer good title by warranty deed, with release of dower and homestead rights. The agreement further provided that the "buyer has paid $500.00 earnest money to be applied on purchase price, and agrees to pay within five days after title is shown good or is accepted by buyer, the further sum of $10,300.00, provided deed as aforesaid shall be ready for delivery. * * * Within twenty days from date hereof, seller shall deliver to buyer or his agent (which delivery may be made at office of Frank B. Votava) as evidence of title covering date hereof, showing record title in seller (or grantor) one of the following:

(2) Owner's Guarantee Policy of Chicago Title and Trust Company in the amount of the purchase price or its customary preliminary report on title subject to the usual objections contained in such policies, though if such report be furnished, seller shall deliver such guarantee policy when deed is delivered, but seller, on furnishing such report shall not be in default for failure to furnish policy until ten days after demand therefor by buyer, such policy or report on title to be conclusive evidence of good title subject only to the exceptions therein stated; * * * If this contract be terminated except for buyer's default earnest money shall be returned, If buyer defaults hereunder, then, at the option of seller, earnest money shall be forfeited as liquidated damages and this contract then shall be null and void." All notices and demands thereunder were required to be in writing and the mailing thereof by registered mail to the parties at the addresses designated were to constitute sufficient service thereof. As there was no broker, there was no provision for a commission. It was provided that the contract and earnest money should be held by the vendor for the mutual benefit of the parties; that after consummation the cancelled contract be retained by him; that unless the buyer be entitled to a refund of the earnest money "it shall be applied first to payment of expenses incurred for seller by said broker, and second to payment of said commission, balance, to be paid to seller."

A perusal of the transcript of the testimony shows that there was no opposition to the prayer of Anna Juliano that the contract be decreed to be a cloud on her title and that it be removed. The issue in the trial arose on the assertion in the counterclaim of the defendants that they should be reimbursed for the $500 deposited as earnest money. Frank Votava testified that he resides in Berwyn; that he is in the real estate and insurance business; that in October, 1948, he owned the real estate in question; that he had known defendants about three years before that time, having acted as a broker in placing their automobile insurance; that on October 9, 1948, Mr. Feibel came to his (Votava's) office in answer to a sign or an advertisement; that he stated he wished to purchase the property at 6301-3 Ogden Avenue; that he gave witness a check for $500 as a deposit; that Mr. Feibel "came to talk about the property before that time"; that on October 10, 1948, witness, who had drawn the contract, took it over to defendants' home to be signed; that the original and a copy were signed by the parties, one being retained by witness and the other by defendants; and that the property is a six room frame residence with brick siding and hot water heat on a lot 50 x 104 feet. Witness testified further that the next time he saw defendants was on October 16, 1948, at witness's office, 6843 Stanley Avenue, Berwyn, at about 6:00 p.m.; that Mr. Feibel told witness that "there is a building going to be constructed just west, adjoining to the lots of 6303 Ogden Avenue, and he didn't know just what type of building it was going to be"; that "it appeared

that it could be a garage or some noisy building;" and that witness replied "that it could be a beautiful building, nobody knows what is to be built there," and he asked them to "think it over and come back and let me know what they thought about going on any further," in reply to which Mr. Feibel said "definitely he wasn't going to go through with the deal." Witness said that he did not see Mr. Feibel in person after October 16, 1948. He stated that he called him on the phone but was not asked to relate the conversation.

Mr. Votava was shown a carbon copy of a letter dated November 15, 1948, which was received by defendants on the following day and which was received in evidence as plaintiff's Exhibit No. 2, and was asked whether he received a reply to the letter. The letter reads:

"Dear Sir and Madam: This is to advise you that pursuant to our conversation of October 16, 1948, wherein you informed me that you were not willing to perform your obligations under the contract we entered into on the 9th day of October, 1948, calling for the sale and purchase of real estate located at 6301-03 Ogden Avenue, Berwyn, Illinois, and during which conversation you further informed not to take any steps to carry out my obligations under the contract. I am hereby advising you that I am holding you in default on your performance under said contract, that the earnest money of $500.00 which you paid to me shall be retained by me as liquidated damages, and that the aforesaid contract is null and void."

He answered that he did not receive a reply to this letter. The attorney for the defendants objected to the introduction of the letter "as being self-serving." He also said: "We received it, but not as evidence as to what went on between the parties." The court said: "It may go in for what it is worth." Mr. Votava said that on February 7, 1949, he executed a contract to sell the realty to Anna Juliano for

$10,300, and a contract so providing was received in evidence. There was also received in evidence a copy of a letter of opinion of the Chicago Title & Trust Company covering a title search of the property to include June 10, 1949, and showing the title in Anna Juliano, subject to the rights of defendants under the contract hereinbefore mentioned. On cross-examination, Mr. Votava testified that he was the owner of the property in question on October 10, 1948; that in a conversation with defendants he offered to get a mortgage for them; that he knew that Mr. Feibel visited mortgage houses to secure a mortgage on the place; and that he did not at any time tender Mr. Feibel a letter of opinion. Mr. Harold Young, a witness called on behalf of defendants, testified that he is a title officer for the Chicago Title & Trust Company. He had the files of his employer with respect to the property. The title company received an application from Mr. Votava on June 30, 1948. According to its records, on June 28, 1948, the title was in Bernice M. Darragh and Elizabeth Darragh. The deed to Frank Votava was dated July 17, 1948, and recorded November 16, 1948, by Mr. Votava. A guarantee policy issued on November 22, 1948. It was unnecessary to issue a report on title as "the records were clear" and the title company issued a policy. Mr. Young also testified that it takes a week or ten days to get a letter of opinion.

Mr. Fred Feibel, Jr., called in his own behalf, testified that he entered into the written agreement on October 10, 1948; that at that time he paid $500 to Mr. Votava; that on October 16, 1948, he had a conversation with Votava in regard to securing a loan "for the building."

Witness said he did not say anything to Votava about not wanting to go through with the contract and that he did not tell Votava that he would not "buy the building." The witness was asked whether he saw Votava "after that" and he replied in the negative. Asked: "You didn't communicate with him when you got his letter?" witness replied: "No sir." Interrogated as to whether Votava offered witness a deed, he replied in the negative. He said he demanded his money back "about three or four weeks later" and that he did so by calling Votava up on the telephone; that in the telephone conversation he told Votava "that it looks like we can't go through with this deal and I would like to have the money back"; that he said Votava did not give the money back to him; that he turned the matter over to his attorney; that the contract was put on record; that he said he did not receive a letter of opinion; that Votava did not offer a letter of opinion; and that so far as witness knew Votava did not offer a letter of opinion to witness's wife. On cross-examination, Mr. Feibel stated that on October 16, 1948, while trying to negotiate for a loan, he discovered that right next door to the property they were buying, a new building was being constructed.

From a summary of the evidence it will be observed that the issue tried was as to the recovery of the $500 by the defendants. The burden of proof under their counter-claim was on the defendants. The evidence establishes that the contract was executed on October 10, 1948. Defendants agreed to purchase the real estate for $10,800. Frank Votava undertook to convey or cause to be conveyed a good title to

them by warranty deed. They paid $500 as a deposit. The vendor agreed within 20 days from the date of the contract to deliver to the buyers or their agent, which delivery could be made at vendor's office, an owner's guarantee policy or a letter of opinion by the title company showing good title in the vendor or grantor. The vendor purchased the property from the Darraghs and took title by deed dated July 17, 1948. While the deed was not recorded until November 16, 1948, it is undisputed that Votava was the owner on October 10, 1948. Under the contract he was in position to convey or cause to be conveyed to the defendants a good title to the real estate. The letter of opinion or guarantee policy contemplated that the title would be shown in the seller or the grantor. There would be compliance with the contract by a deed either from the seller or grantor. There are occasions when a seller is in a position to direct the title holder of record to execute and deliver a proper deed.

Mr. Feibel testified that at the conversation of October 16, 1948, there was talk about securing a mortgage on the building. Votava stood ready to arrange for a mortgage. Undoubtedly, a mortgage could be procured. Mr. Feibel admitted that on that day he discovered that "there was some sort of factory or junk yard" about to be constructed next door to the property which defendants agreed to purchase. There is no denial that Mr. Votava testified that he endeavored to persuade defendants that "no one knew what was going up there" and that "it could be a beautiful building." The only material variance between Mr. Feibel's

testimony and that of Mr. Votava was that the former denied that on October 16, 1948, he told the latter that he was not going through with the deal. Mr. Feibel said that he demanded his money back three or four weeks later and that this demand was made in a conversation over the telephone. He also stated that at that time he told Votava that "it looks like we can't go through with this deal and I would like to have the money back." The contract provides that notice may be sent to the addresses of the parties mentioned therein. On November 15, 1948, Mr. Votava sent a letter to defendants alluding to the conversation of October 16 and advising them that because of their default in performance of the contract the earnest money of $500 would be retained as liquidated damages and that the contract would be considered "null and void." The letter was received by defendants. It was received in evidence by the chancellor. Defendants acknowledged that the letter was received. In the trial they objected to the letter being admitted into evidence. However, in this court they do not assign any error because of the admission of the letter. This letter is strong corroboration for Votava's testimony. There is no explanation as to why Mrs. Feibel, who was present during important conversations, was not called as a witness. A purchaser of real estate, in order to recover a down payment, must put the vendor in default by tender of performance on his part before he can maintain his action. Christopher v. West, 340 Ill. App. 225. It is clear from the testimony in the instant case that Mr. Votava was ready, able and willing to convey good title to the defendants and that the deal was

not consummated because the latter abandoned it. The seller had 20 days from October 10 in which to deliver a letter of opinion from the title company to defendants or their agent. The record shows that Votava could have delivered such an opinion showing clear title in him or another person who could give the deed as grantor. That Votava did not deliver a letter of opinion was due to the fact that prior thereto the defendants decided that they would not go through with the deal and so informed Votava. Where one party renounces a contract and refuses to perform, the other party is excused from performance on his side. When the defendants renounced the contract within the 20 day period in which the letter of opinion should be delivered, Votava was excused from delivering such an opinion. The delivery of the opinion then would be a useless act. Votava did not gain anything by retention of the earnest money, as he sold to Anna Juliano for $500 less than called for by his contract with the Feibels.

Because of the views expressed the judgment of the Superior Court of Cook County on the counterclaim against Frank Votava is reversed and the cause is remanded with directions to enter judgment on the counterclaim in due form in favor of Frank Votava and against Fred Feibel, Jr., and Emma M. Feibel.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.

455

45238

VERNON M. DARNELL, Appellant, v. STRAND HOTEL CORPORATION, a corporation, Appellee.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action. Defendant Chicago Ballantine Distributors, Inc. was dismissed on stipulation after obtaining from plaintiff a covenant not to sue. Trial was had as to defendant Strand Hotel Corporation and the verdict was not guilty. Plaintiff has appealed from the judgment on the verdict.

The Strand Hotel is located on the east side of Cottage Grove Avenue between 63rd and 64th Streets, Chicago, Illinois. Maryland Avenue is the next street east of Cottage Grove. On October 14, 1946, plaintiff was walking north on the west side of the north-south alley between Cottage Grove and Maryland Avenues. A Ballantine Company truck was parked beneath the fire escape on the rear wall of the Strand Hotel. As plaintiff was walking beneath the fire escape and about four feet east of the rear wall of the hotel, the truck pulled away to the north. At this time the counter-balance, or movable section of the fire escape which lowers to the ground, descended on plaintiff and injured him.

The complaint alleged negligence on the part of the hotel corporation in permitting the fire escape to be in a defective, dangerous condition; in failing to make fast its movable part after the unsafe condition was or should have been known; in maintaining it so that its clearance was less than the fourteen feet required by the City Code; and in failing to warn the public and plaintiff of the fire escape's unsafe condition after its condition was or should have been known. The hotel corporation's answer made issue of these negligence charges. After its co-defendant was dismissed, the hotel corporation filed an amended answer, stating that plaintiff had received $4500 for a covenant not to sue.

Plaintiff contends that the trial court erroneously admitted prejudicial hearsay testimony; that defendant's attorney was permitted to make improper and inflammatory argument to the jury; that the jury was not properly instructed on the question of the covenant not to sue; and that the verdict was against the manifest weight of the evidence. For these, or some one or more of these, reasons the plaintiff asks that the judgment be reversed and that a new trial be had of the issues.

There was testimony given that a bystander stated the Ballantine truck had hit the fire escape. The question which evoked this testimony was asked in substantially the same form and answered three times without objections. The objection to the fourth question was overruled. We need

not pass on the claimed error. If any prejudice was suffered because of the questions and answers, the harm was done without objection. Had the court sustained the objection to the fourth question it would merely have prevented additional harm. Moreover there was other testimony bearing on the cause of the fall of the fire escape.

Plaintiff argues that in referring to the covenant not to sue, defendant's attorney accused plaintiff's attorney of "shaking down" the hotel corporation and of making a "deal". In the full context of his argument defendant's attorney argued to the contrary. The point he made was that there could have been no "shake down" because the Ballantine Company could not have been frightened and would not have paid if it was not liable. This turn of argument was an effective one for defendant because its objective was to show that Ballantine's truck and not the fire escape, was the instrumentality which proximately caused plaintiff's injury. While the use of the term "shake down" in any part of the argument was unfortunate, we cannot say its use inflamed the jury. The same is true of the term "deal". Plaintiff's attorney did not object to these parts of the argument. Globe Co. v. United Pressed Products Co., 303 Ill. App. 650. In Paulsen v. McAvoy Brewing Co., 220 Ill. App. 273, cited by plaintiff, there were repeated objections and, though these were sustained, the offending attorney persisted in making inflammatory remarks.

There was evidence that Ballantine Company paid $4500 for the covenant not to sue. Plaintiff's attorney argued that the jury should subtract that sum from the damages it found due plaintiff. Instruction No. 4 merely outlined the issues made by the pleadings and referred to the "defense" of the covenant not to sue. It did not tell the jury that if it believed the covenant was given, the jury should find for the hotel corporation. The record does not show at whose request the instruction was given. Horvat v. Opas, 315 Ill. App. 229. Nor can we draw the inference, as in Rather v. City of Chicago, 298 Ill. App. 625, that it was defendant's instruction. Assuming that it was, it was the only instruction given on the covenant and we see nothing in it of harm to plaintiff.

It is conceded that plaintiff was in the exercise of due care. The questions of fact for the jury were whether the hotel corporation was negligent, and, if so, whether its negligence was the proximate cause of plaintiff's injury.

The part of the fire escape which struck plaintiff had descended with a "squeak" and a "crash". After the accident this part was "entirely wrecked" and "practically a total collapse". The railings had been knocked off and the counterbalance had buckled and was inoperative. It was taken down and laid in the alley. It had knocked plaintiff down and pinned him against the building.

About two weeks before the accident the fire escape had been struck and damaged by another truck. The brace supporting the second floor platform was buckled and had tilted the platform toward the building. This tilting disconnected the stairs between the second and third floors and tipped the counterbalance out of line. The brace of the platform was loosened. Its anchors had not been pulled from the wall and the axle of the counterbalance was not damaged. No masonry work was required. The fire escape was inspected at the time and a recommendation made only that the damaged part be painted. There was no danger that it "might come down".

Between that event and the accident herein the counterbalance was tested and, though out of line, "appeared to be in good working condition". A City ordinance required a clearance of fourteen feet beneath the counterbalance. After the first damage was done there "appeared to be" that clearance. After the accident an inspection of the fire escape showed the brace and anchors pulled from the wall and the axle of the counterbalance damaged.

There was evidence that cardboard cartons of empty bottles had been piled two rows high on top of the Ballantine truck. The truck measured nine feet and ten inches from the ground to the roof. A helper on the truck testified that the double row of cartons increased the overall height to ten feet and seven inches. He also said he did not know what the measurement was. The cartons of empty bottles

weighed from twenty to twenty-four pounds each. Immediately after the accident an inspection of the truck showed no damage to the top of the truck but did show "crumbs of rust on the roof", "a crease on half the cases and paint scale and rust", a "big gash in one beer case" and that the cases were "pushed back".

In addition to the foregoing there was evidence that Ballantine had paid plaintiff $4500 for the covenant not to sue. We think that the record does not show the verdict to be against the manifest weight of the evidence.

This conclusion renders it unnecessary for us to pass on the contention that part of the medical testimony was hearsay and erroneously admitted. That testimony bore only on the damages.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND LEWE, J. CONCUR.

45303

PETER LOULOS, Appellant,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
GEORGE CHIBUCOS, Appellee.	)	OF CHICAGO.

343 I.A. 518

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit upon a note. Defendant claims the note was given in consideration of a promise not to criminally prosecute the maker's son and is, therefore, invalid. Trial by the court, without a jury, resulted in a finding for defendant. Plaintiff appeals from the judgment entered on the finding.

The note for $7,000 was signed August 26, 1947, and was due September 11, 1947. An indorsement acknowledges payment on the note of $1,000 by defendant's son Peter on September 9, 1947. September 12, 1947, plaintiff confessed judgment for $6,382.50, being the balance due plus attorney's fees. Execution issued, was served upon defendant's wife, September 23, 1947, and was returned "no property found".

April 1, 1949, attorney Strong, who confessed judgment as plaintiff's attorney, withdrew in favor of attorney Kopald. June 3, 1949, a petition was filed alleging "this defendant" had paid the note down to $2,000. The petition was signed with an "X", purporting to be defendant's mark. It was witnessed by defendant's attorney Whitney. A photostatic copy of the note bears the name of defendant,

printed by hand. The prayer of the June 3rd petition was that the writ of execution be quashed. June 15th partial satisfaction of judgment in amount of $3,750 was ordered by the court under an agreement of the parties.

August 23, 1949, a petition, copy of which indicates the original bears the handwritten signature of defendant, was filed praying that the confession of judgment, September 12, 1947, be vacated. It alleged defendant's age as 65 years; that he was unable to read or understand English; that August 26, 1947, plaintiff told defendant the latter's son Peter was guilty of fraud and that plaintiff threatened criminal prosecution of defendant's son unless plaintiff signed "certain papers"; that under the threat and ignorant of legal consequences, defendant signed the paper; that what he signed turned out to be the judgment note; that the petition of June 15th, upon which judgment was partially satisfied, was not authorized by him nor did he know of its filing; and that he knew nothing of the judgment "until a few weeks ago".

April 20, 1950, a hearing was had on the petition to vacate. The order recites that an answer was filed. The answer is not in the record before us. Defendant, notwithstanding the statement in the verified petition, stipulated that he had been served with execution in September 1947. It was also stipulated that he had received a letter from plaintiff's attorney Kopald on March 30, 1947, stating that unless arrangements were made to pay the balance of the note, "such further action in the matter as the circumstances

may warrant" will be taken. Evidence and arguments were heard. Judgment was opened and defendant given leave to defend. May 25, 1950, trial was had and judgment was in defendant's favor.

The question is whether the finding and judgment are erroneous as a matter of law.

We think the allegations of the petition to vacate and for leave to defend justified opening the judgment to allow the defense and trial. The allegations of signing under threatened prosecution of defendant's son might, if properly and adequately proven, defeat plaintiff's action. Kronmeyer v. Buck, 258 Ill. 586; Hertel v. Rebhan, 264 Ill. App. 548.

At the trial plaintiff introduced the note and rested his case. Neither defendant nor his son Peter testified in defense. The only witness for defendant was plaintiff's former attorney Strong. His testimony was that defendant's son and plaintiff, in contemplation of a partnership, agreed to invest $13,000 and $7,000, respectively, in a restaurant business; these sums were to be deposited in a joint bank account; that subsequently defendant's son made arrangements to, and did, withdraw the $7,000 deposited by plaintiff; that Strong told defendant's son that unless the $7,000 were restored, the matter would be turned over to the State's Attorney; that defendant's son told Strong defendant would be security for the son's paying the debt; that subsequently defendant and his son came to Strong's office and, in plaintiff's presence, Strong told defendant's

son to "explain everything" to defendant; that defendant and his son conversed in the Greek language which Strong did not understand; that the note was then signed by defendant; that whatever payments were made on the note were made by defendant's son; and that Strong withdrew as plaintiff's attorney when informed by plaintiff that he and defendant's son had settled their difference.

We cannot presume an unlawful agreement. Tramblay v. Hyde Park State Bank, 336 Ill. 80. The proof shows that defendant's son defrauded plaintiff and does not show that defendant had any knowledge of a threat to prosecute his son. Tramblay v. Hyde Park State Bank; Kronmeyer v. Buck, 258 Ill. 586; Hertel v. Rebhan, 264 Ill. App. 548. The finding and judgment were therefore erroneous as a matter of law.

We need consider no other points raised. Judgment is reversed and the cause is remanded with directions to enter judgment for plaintiff in an amount equal to the unsatisfied part of the judgment entered September 12, 1947.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J. AND LEWE, J. CONCUR.

457

45346

THE NORTHERN TRUST COMPANY, as Trustee under the Will of John F. Laubender, Deceased, Plaintiff - Appellee, v. LOU CULLOP, et al., Defendants - Appellees, On the Appeal of JAMES H. THOBURN and Wilbur W. Thoburn, Defendants - Appellants.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

343 I.A. 519

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit for construction of a will and for instructions as to the distribution of a share of a trust estate.

John Laubender made a will July 7, 1922. A codicil made thereafter is not material to this case. The first six "Sections" of the will are not relevant here. In "Section" seven there was established a trust upon which this suit has arisen. The residuary estate was given in trust to the plaintiff trustee. Among the directions to the trustee was the payment of annuities, from income and principal if necessary, during the life of John Laubender's wife Ella, to her; to her sister and Laubender's sisters; to his brothers, Henry and William; and to the widow of his brother August. The trustee was also directed to divide the "balance of the trust estate," upon the life tenant's death, into nine equal shares. One share was to be "paid or held" for each brother, sister and sister-in-law, to whom

bequests had already been made in the will, and one share to be forthwith given to the descendants of a deceased sister. George Laubender, testator's brother, was not given a trust annuity but was a legatee in the will and, accordingly, was one for whom a share of the remainder was provided. It is that share which is involved in this proceeding.

The will provided that the share "of * * * George * * * shall be paid, transferred and assigned * * * outright, if living, at the time of distribution." The same provision is made for brother William. The shares of the rest were to be held in trust for their lives with income paid to them. The share of the widow of brother August was to be held in trust and income paid to her for life unless she remarried. Provisions with respect to these trusts are not relevant to our decision.

Further provision was made that should George die before Ella Laubender, leaving a widow, the latter was to have the income "from said brother's share;" should George die and leave no widow surviving, "his share" was to be "transferred, conveyed and assigned" to his descendants then living; should George die and at Ella's death no descendants of George be living, "the same" was to be distributed according to George's will.

The will of John Laubender was admitted to probate in 1924. His surviving wife, Ella Laubender, died in 1947. George Laubender predeceased her in 1927. George's widow

died in 1934. At Ella's death there were no descendants of George then living. George left no will. His widow left a will bequeathing all her personalty to Emma Roberts. Defendants-appellees are her heirs. Ella Laubender died intestate, leaving defendants-appellants as her only heirs-at-law.

The trustee alleged that uncertainty existed as to who is entitled to the one-ninth share which would have been given George Laubender on the death of Ella, had George survived her. Defendants-appellees denied that uncertainty existed. They alleged that George Laubender had a vested interest which passed to Emma Roberts under the will of George's widow. The court found the filing of the complaint was justified. It construed the will as creating a vested interest in one-ninth of the remainder in George Laubender, that there was no divestment, and that that share should be distributed to the personal representative of George Laubender. The heirs-at-law of Ella Laubender have appealed.

The question is whether the chancellor properly decided that the will created a vested one-ninth interest in the remainder in George Laubender.

The requirement that he be living at Ella Laubender's death in order to take "his share," made it unascertainable until her death that he would be entitled to the share. Northern Trust Co. v. Wheeler, 345 Ill. 182. Furthermore the reason for postponing the gift was personal to George

Laubender, that is that he be living, and not for the convenience of the fund, that is to let in a life estate before he would come into enjoyment of the gift. Campbell v. Campbell, 380 Ill. 22; Scofield v. Olcott, 120 Ill. 362.

The language used does not manifest an intention to grant a vested interest to George Laubender but rather to postpone the vesting of the interest in him until the death of Ella, should George be living. Meldahl v. Wallace, 270 Ill. 220. If there had been an intention to grant a vested remainder, the executory devise to George's descendants then living and the power of appointment in him would have been unnecessary. Meldahl v. Wallace. George could have devised a vested interest without the power of appointment and his descendants "then living" would take without a conveyance.

Defendants-appellees attach importance to the provision that George's "share" was to be given him "outright, if living, at the time of distribution." We agree with defendants-appellants that the term "outright" was used to distinguish the method of distributing the shares intended for George and William from the method of distributing the rest of the shares, except for the share of the deceased sister's descendants, which were to be held in trust for the beneficiaries.

The only case cited in the argument of appellees to sustain the decree is Northern Trust Co. v. Wheaton, 249 Ill. 606. In that case there was no condition of survival attached to the interest granted. There was no uncertainty

as to who would take the interest and the postponement of the enjoyment of the estate was solely to let in life interests. The court reaffirmed the rule that where the postponement is for the convenience of the fund and not for reasons personal to the remaindermen, the interest is vested. In an illustration given in the opinion the condition of survivorship was said by the court to create a contingent remainder.

For the reasons given we believe the interest of George Laubender was contingent and not vested. The decree is erroneous. The contingency upon which the interest of George Laubender depended, failed. He had not exercised the power of appointment and there were no descendants in whose favor the executory devise could operate. When the time for distribution came, that share of the remainder was not otherwise disposed of in the will. It reverted to the testator and descended as intestate property to his sole heir-at-law, Ella Laubender. Since she died intestate, the share descended to her heirs-at-law, the defendants-appellants.

For the reasons given the decree is reversed and the cause is remanded with directions to enter a decree in conformity with the views expressed herein.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J. AND LEWE, J., CONCUR.

458

45356

BLOCK STEEL CORP., a corporation, Appellee, v. RUSSAKOV CAN COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

348 I.A. 519

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover the balance of $8,815.84 due on a contract of sale of sheet steel. Defendant counter-claimed for $7,118.68 alleged to be due it over and above the amount due plaintiff as damages for breach of the contract. The court, without a jury, found for plaintiff on its claim and against Russakov Company, referred to hereinafter as defendant, on its counter-claim. Defendant has appealed from the judgmentson the findings.

On June 22, 1949, defendant sent plaintiff an offer to purchase approximately 1100 tons of steel sheets for use in performance of a government contract. This offer stated that defendant would advise the exact size and quantities later. Shipments were to be weekly in approximately equal proportions for each month which shipments were to be 140-150 tons during July and 180-200 tons during August-December inclusive. The shipments were to be subject to change in size and quantity. The contract was made between the parties by the acceptance of the purchase offer. The terms of payment were stated to be "1/2 of 1% 10 days—30 days net". June 27th the contract was modified. The price per hundred weight was reduced

from $4.25 to $4.20. The form of the quantities to be shipped was changed to pieces instead of tons, 49,200 pieces for the month of July and 62,500 pieces during August-December inclusive. Plaintiff was to withhold shearing of the sheets subject to defendant furnishing the exact size.

The first shipment of the steel was made August 16, 1949. Thereafter steel was shipped almost daily until October 1st. Shipments in October were made on the 3rd, 6th, 12th and 13th. No shipments were made after October 13th. An industry-wide steel strike was in effect from October 1st to November 15th. The total shipments made by plaintiff to defendant under the contract was 74,425 pieces. The contract contemplated a sale of 361,700 pieces. October 19th, 25th and 27th plaintiff purchased steel from defendant and credited the purchase prices to defendant's account. November 16th and 23rd defendant made cash payments totaling approximately $4,000 on its account. The cost of the steel shipped to defendant was $19,280.52. The total of the credits and the cash payment by defendant was $10,609.20. Judgment is for the difference between the two figures plus interest.

October 27th defendant wrote plaintiff calling attention to plaintiff's failure to deliver according to promise steel to be shipped during the week of October 23rd and referring to plaintiff's refusal to make future shipments. November 7th plaintiff wrote defendant that only 225 tons of steel had been released by defendant to October

1st and that none had been paid for within the 30 day contract term. It also notified defendant it was rescinding the contract and called for payment of the amount due it. November 15th defendant answered that plaintiff had admitted its inability to deliver more than 225 tons to October 1st; that the 30 day payment period had been modified by an oral agreement to 60 days; enclosed a check on account; and referred to the urgent need for future delivery. November 28th plaintiff wrote again reaffirming the rescission of the contract on account of defendant's failure to release shipments and calling for payment of the account. November 28th defendant wrote asking when shipments could be expected and stated that unless it was advised by return mail, it would be forced to purchase the needed steel in the open market. November 30th plaintiff again wrote charging defendant breached the contract through failure to release steel and failure to pay for steel released and accepted.

The defendant insists that the terms of payment in the original contract were modified from 30 to 60 days in a conversation between officials of plaintiff and defendant companies. Testimony of the conversation was admitted in evidence over plaintiff's objection. Plaintiff does not properly claim there was error in the ruling but argues upon the conflicting testimony. The conversation was denied by plaintiff's official. A letter confirming the change in the form of the quantity to be shipped and in the price makes no mention of change in the terms of payment. Defendant's official testified that this omission was due to the fact that plaintiff's official asked that no mention of the agreement be made in writing. We infer from the findings that the trial court believed plaintiff's testimony rather than defendants. We cannot say the belief was not justified.

The terms of payment in the contract were "net--30 days". Though defendant was sent an invoice with each shipment, no statement was sent until the end of the month. The statement covering the account to October 1st was not paid. Thereafter plaintiff purchased steel from defendant and credited the purchase price to defendant's account. It also shipped steel as late as October 13th under the contract to defendant. The statement covering the account to November 1st was not paid. Consequently, on November 7th, when plaintiff notified defendant that the contract was rescinded, defendant was in default.

Defendant does not discuss Harber Bros. v. Moffat Cycle Co., 151 Ill. 84, which is cited by plaintiff. The facts in that case are similar to those in the instant case though the vendee there was plaintiff. The history of the business dealings between the parties is strikingly like that in the instant case. When the Russakov Company was complaining about failure of delivery late in November, it was in default in payment for steel it had received. Plaintiff had the right to refuse to ship more steel until payments were brought up to contract terms. Defendant could not use its default and the consequent non-delivery by plaintiff to build up a counter demand in excess of what it owed for steel already received. Harber Bros. v. Moffat Cycle Co., 151 Ill. 84.

The statement of the account to November 1st, had it been paid before plaintiff declared the rescission November 7th, would have covered shipments under the contract made up to the 30th day prior to payment. It is

argued that plaintiff, by giving defendant the order early in October and shipping steel to defendant up to October 13th, waived its right of declaring a default, in view of the monthly statements, until after December 1st. This argument would avail nothing to defendant, even if valid, for the reason that there was no testimony that defendant was forced, by reason of plaintiff's conduct, into the open market for steel during this period. Prior to its letter of November 28, 1949, which called for advice by return mail when shipments could be expected, no notice had been given plaintiff that defendant would be forced to acquire steel elsewhere. Presumably it was not to go into the open market until plaintiff had an opportunity to answer by return mail. This being true, we see no necessity of going into the question whether the strike in the steel industry was an excuse for plaintiff's refusal to make further shipments.

We see no reason to discuss any other point made. Defendant has shown no reason in law for reversing the judgments. We cannot say that the factual findings or judgments of the trial court are against the weight of the evidence. The judgments are therefore affirmed.

JUDGMENTS AFFIRMED.

BURKE, P.J. AND LEWE, J., CONCUR.

45419

PEOPLE OF THE STATE OF ILLINOIS, ex rel ANNE HARRISON, Appellee, v. VINCENT SIROKY, Appellant.	APPEAL FROM CRIMINAL COURT COOK COUNTY

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a proceeding under the Bastardy Act (Chap. 17, Ill. Rev. Stat.). The trial court, without a jury, found defendant was "the real father" (Sec. 4) of relatrix's child and entered judgment accordingly (Sec. 8). Defendant has appealed.

The proceeding was begun before a police magistrate in April 1950. There was a finding that the "offense charged" was "committed" and that there was probable cause for believing defendant guilty. Defendant was ordered to trial in Criminal Court where, after several continuances, the trial began November 14, 1950.

At the time of the trial relatrix was thirty-three years of age. She met defendant for the first time in January 1949. They had several "dates". The relatrix's last menstrual period was about March 15th. Her baby was born December 30, 1949. The baby was a nine month child. The doctor's certificate read into the record indicates that on July 12th relatrix was three and one-half months pregnant.

It is admitted that relatrix and defendant had sexual intercourse. The important factual issue at the trial was whether they had intercourse within the period of gestation after the end of relatrix's March 1949 menstrual period. The sole question on appeal is whether the decision of the trial court on the ultimate issue of the child's paternity is against the manifest weight of the evidence.

Upon direct examination relatrix testified that the first time she had intercourse with defendant was March 30th and the next time on April 2, 1949. She said both of these acts occurred at night in defendant's automobile and the April act, across the street from her home. She said the next and last act of intercourse occurred May 30th in a hotel out of the City. She testified that she had intercourse with no other person than defendant during this time. This is not denied.

On cross-examination she said she remembered testifying before the police magistrate that her first "relations" with defendant was on January 5, 1949. In answering a subsequent question she said she did not testify then that she had relations with defendant in January and February. She also testified that she told the magistrate she had no "relations" with defendant from February until May 30th. She stated that what she meant "now" was that she had no "relations" between January and May; that she menstruated, after her January "party," in March and had nothing to do

with him again until May 30th; and that between March 15th and May 30th she had no "party" with defendant. On re-direct examination, in answer to a question pointing out the inconsistency in her testimony, she repeated that she had "relation" with defendant in April. On re-cross she testified that she told the police magistrate the same thing about April as she testified on re-direct. Her final testimony was that the first time she had "relations" with defendant was after her March menstrual period and that that was her testimony before the police magistrate.

Relatrix's mother gave testimony corroborating relatrix as to the April event. She said she observed the event from a window in her home.

Defendant testified that he had sexual intercourse with relatrix in January, February and in May but not in March or April. He denied that relatrix testified before the police magistrate that she had not had intercourse with him in January and February. He said she then testified that they had not had intercourse between March 15th and May 30th. He did not "recall" the April 2nd incident. He said he had a date with relatrix between March and May. In response to questions of the trial judge about whether he was with relatrix on the night of April 2nd, he said, "I doubt it," and said he had no "relations" with her in April "that I remember of".

Relatrix is not married. Defendant was married November 30, 1949. His wife, the police magistrate, and the

Assistant State's Attorney who prosecuted the complaint before the police magistrate, testified in behalf of defendant. Their testimony contradicted that of plaintiff as to what she testified before the police magistrate. It is admitted that there was discussion before the magistrate whether the baby was a seven or nine month child. This discussion led to the doctor's certificate stating that on July 12th relatrix was about three and one-half months pregnant. The trial court computed that between April 2nd and December 30th there were 271 days.

Before giving judgment the trial judge stated that he "wouldn't say that the lady didn't tell the truth; * * * as near as she could remember, because doubtless in the month of January and the month of February and on and off they probably had intercourse". The court may have had in mind defendant's testimony that he had sexual intercourse with relatrix in January and February in his automobile and on May 30th in the hotel; that he had a "date" with her once between March 15th and May 30th; and that he could not recall that April 2nd incident and could not remember having had intercourse with her in April.

The testimony of relatrix is not as clear and definite as it could be. There are inconsistencies in her testimony and yet a reading of the full transcript indicates why the trial court, though finding "some discrepancies," thought relatrix was telling the truth about the April 2nd incident. There are other inconsistencies in relatrix's

testimony. She said that in July the doctor told her she had a fast growing tumor. The doctor's certificate is to the contrary. There is no denial that she was pregnant at the time. The mother's testimony that she saw the April 2nd incident and did not discuss it with defendant until December 11th and that she raised no outcry and did nothing at the time, seems strange. Her complete testimony, however, carries conviction.

We think the position of a trial court judge is especially suited, when testimony is given as it was by relatrix and her mother, to determination of the truth in the testimony. From a full consideration of all the testimony, we cannot say that the finding and judgment are against the manifest weight of the evidence. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J., and LEWE, J., concur.

45320

460

THE UNION NEWS COMPANY, a corporation, Appellant, v. CONTINENTAL ELECTRIC CONSTRUCTION COMPANY, a corporation, and BITUMINOUS CASUALTY COMPANY, a corporation, Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY

343 I.A. 521

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing its complaint in an action to recover compensation payable but not yet ascertained or paid under the terms of the Workmen's Compensation Act, sec. 29 (ch. 48, sec. 166, Ill. Rev. Stats., State Bar ed. 1949) to one of its employees who was injured by the negligent act of a third party.

The complaint consists of four counts. According to the allegations of counts 1 and 2, defendant Continental Electric Construction Company, a corporation, was engaged in erecting and installing certain equipment in a cigar counter located in the lobby of an office building in the City of Chicago when an employee of the Construction Company fell and injured Georgia Vavrick, one of plaintiff's employees.

At the time of the accident, plaintiff and the Construction Company and its employees were subject to the provisions of the Workmen's Compensation Act. December 9,

1948, Georgia Vavrick filed a claim for compensation with the Industrial Commission against plaintiff. In counts 1 and 2 the complaint also alleges that, "There may be payable" under the terms of the Compensation Act sums aggregating $5,500 for injuries sustained by Georgia Vavrick for which the Construction Company is liable, and that plaintiff is subrogated to the right of recovery against the Construction Company under the provisions of section 29 of the Compensation Act.

Counts 3 and 4 are similar to counts 1 and 2 except that they contain additional allegations that defendant Bituminous Casualty Company insured the Construction Company against damages which it "may have to pay" as a result of the injuries sustained by Georgia Vavrick; that plaintiff has a lien on the funds of the Casualty Company as insurer until the liability of plaintiff to Georgia Vavrick is determined by the Industrial Commission.

In the concluding prayer of counts 3 and 4 plaintiff asks that the court decree the amount which may be found due Georgia Vavrick from plaintiff be paid to it by the Casualty Company.

The complaint fails to allege that the compensation payable to plaintiff's employee has been fixed or paid.

The question presented is whether plaintiff's action under section 29 of the Compensation Act against the Construction Company will lie before the amount payable to its injured employee is determined. Under almost identical

circumstances this proposition has been decided contrary to the plaintiff's contention in Schlitz Brewing Co. v. Chicago Rys. Co., 307 Ill. 322. There the court held that the action cannot be instituted until after the compensation is fixed. To the same effect see Bauer v. Rusetos & Co., 306 Ill, 602, and Friebel v. Chicago City Ry. Co., 280 Ill. 76.

In the view which we take of this case it is unnecessary to consider the other points raised.

For the reason given, the order dismissing the complaint is affirmed.

ORDER DISMISSING AFFIRMED.

BURKE, P. J., AND KILEY, J., CONCUR.

461

45379 45397

THOMAS LEE EPNETT and MELVINA H. EPNETT,	)	APPEAL FROM
Appellants,	)	SUPERIOR COURT,
v.	)	COOK COUNTY.
JAY GORAN, individually and as Trustee under Trust No. 2325,	)	
Appellee.	)	

348 I.A. 521

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order dismissing their complaint for want of equity in an action to rescind a real estate contract and for the recovery of exemplary damages.

The complaint consists of two counts. The allegations in each count are substantially the same and may be summarized as follows. Plaintiffs entered into a written agreement with defendant to purchase the property described as "Front building only at 1214 N. Frontier, Chicago, Illinois," for the sum of $5,900 payable $500 upon the signing of the agreement and $75 monthly on the 3rd day of each month commencing January 3rd until the purchase price is fully paid. Some time before executing the agreement, plaintiffs' interest in the premises was "aroused" by an advertisement, published by defendant in a Chicago newspaper, stating "that it was a two-flat building ready for occupancy." November 29, 1948, plaintiff, Melvina H. Epnett, wife of Thomas Epnett, by prearrangement with defendant was shown the upper story of the premises by an agent of defendant. At that time she

asked to be shown the lower story but was informed by the agent that he did not have the keys. About December 3, 1948 both plaintiffs were shown the upper story by an agent of defendant. On this occasion when plaintiffs requested to be shown the lower floor the agent told them it was locked, that he did not have the keys, and that the previous owner had personal property stored there. During the negotiations leading to the making of the agreement of sale, defendant and his agent represented that the premises were "reasonably adapted to human habitation," and that defendant and his agent at that time knew that these representations were false. December 6, 1948, plaintiffs moved into the upper story with the intention of renting the lower portion of the premises to a tenant. January 3, 1949, plaintiffs discovered "a dampness" on the walls. January 19, 1949 plaintiffs broke open the lock on the front door of the lower story and upon entering discovered that it contained "a huge pile of junk"; that the foundations of the building were damp, moldy, and crumbling away, and that many of the supporting beams were inadequate and loose. March 14th plaintiffs had the exterior of the building covered with "insulite" brick siding at a cost of $530, and about March 23, 1949 installed storm windows at a cost of approximately $272. Notwithstanding the insulation of the exterior and the installation of storm windows, the dampness continued to seep up from the ground to the house, covering large portions of the walls and creating puddles of water on the floor of the upper story of the premises. After taking possession

of the premises plaintiffs paid the monthly installments under the terms of the agreement, commencing in January 1949. The last installment payment was made in November 1949 and on March 7, 1950 plaintiffs voluntarily vacated the premises.

The record shows that the original complaint was filed February 2, 1950 and was afterwards dismissed on defendant's motion. May 17, 1950, pursuant to leave of court, plaintiffs filed their amended complaint. According to the allegations of the amended complaint, plaintiffs occupied the premises from December 6, 1948 until March 7, 1950. When plaintiffs entered the lower floor or basement of the premises on January 19, 1949, they discovered that the alleged representations made by defendant were untrue, yet they continued to make the monthly installment payments and made substantial improvements on the property. The present suit was instituted more than a year after plaintiffs learned that defendant's representations were false. In considering defendant's motion to dismiss, the complaint must be strictly construed against plaintiffs. See Klein v. Chicago Title & Trust Company, 295 Ill. App. 208.

In the first count of their amended complaint, plaintiffs pray for equitable relief. Our courts have repeatedly held that when a party claims that he has been misled by false representations, if after discovering the untruth of the representations he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives the benefit of the

relief that he might have claimed because of the misrepresentations. (Hungerford v. Behrends, 308 Ill. 406.)

In Greenwood v. Fenn, et al., 136 Ill. 146, the court, at page 158, adverting to Grymes v. Sanders, 93 U. S. 55, said: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred." To the same effect see White Brass Castings Co. v. Union Metal Mfg. Co., 135 Ill. App. 32, 83 N E 540, and Day v. Ft. Scott Investment & Improvement Co., 53 Ill. App. 165, Aff. 153 Ill. 293, 38 N E 567.

Under the authorities last cited the plaintiffs are clearly barred from obtaining the relief prayed for in the first count of the amended complaint.

As to the second count, in which plaintiffs claim punitive damages in the sum of $30,000, there are no allegations that defendant or its agent prevented plaintiffs from examining the lower floor or basement of the premises here involved. It merely alleges that defendant's agent told plaintiffs that the door was locked, that he did not have the key, and that the former owners had goods stored there. So far as the pleadings show, these representations were true. In order to gain access to the basement plaintiffs admit they broke the lock on the door and found property stored there which they characterized as "junk." If plaintiffs were induced to purchase the premises because they

intended to lease the basement, then it becomes extremely difficult to reconcile that alleged intention with their subsequent conduct, since they admit in their complaint that they did not attempt to enter the basement until about forty-five days after the acquisition of the premises, that they made improvements, continued to make installment payments until the following November, and remained in possession until March 7, 1950. In order to recover, the false representations must have been such as were calculated to deceive a person of common prudence. See Farwell v. Linn, 59 Ill. App. 245. In the instant case plaintiffs by the exercise of ordinary care could have detected the alleged defects before executing the purchase agreement. If they did not avail themselves of the means of knowledge open to them they cannot be heard to complain. (Simpson v. Adkins, 311 Ill. App. 543; Day v. Milligan, 72 Ill. App. 324.) In our opinion the second count fails to state a cause of action.

Plaintiffs say that the entire amended complaint was dismissed for want of equity despite the fact that it contains a law count for damages based on fraud and deceit. Defendant argues that the pleadings show that it is an equity matter charging fraud and praying damages. We agree with plaintiffs. The order here appealed from as to the second count, which sounds in tort, is not in proper form. By virtue of the authority conferred upon this court by section 92, paragraph (e) of the Civil Practice Act, the judgment order as to count 2 is modified to read: That plaintiffs take nothing by their complaint and go hence without day.

For the reason given the order of June 19, 1950 entered by the Superior Court, as modified by this court, is affirmed.

ORDER, AS MODIFIED, AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

2203 A 23

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

To The February Term, A. D., 1951.

Term No. 51F16 Agenda No. 4

- - - - - - - - - -

MARY E. AKINS, Petitioner-Appellee, -vs- ROAD DISTRICT NO. 7, Alexander County, Illinois, IRA A. WALL, County Superintendent of Highways, Alexander County, Illinois, HARRISON PARKER, Clerk of Road District No. 7, Alexander County, Illinois, Respondents-Appellants.	Appeal from the Circuit Court of Alexander County.

- - - - - - - - - -

BARDENS, J.

The Petitioner in this case was Mary E. Atkins who was the owner of a 40 acre tract of land in Alexander County, Illinois. Other persons owned the property surrounding her tract, and Petitioner contended that there was no road or other means of ingress or egress leading to her tract from a public road. She instituted this proceeding to lay out and establish a road for both private and public use by filing her Petition with the Road Commissioner of Road District No. 7 of that county. This was done under the provisions of sub-division VI of the Roads and Bridges Act, being Chapter 121, Illinois Revised Statutes 1949, Paragraph 79 et seq. Upon hearing, the Road Commissioner denied the Petition. Thereafter, the Petitioner appealed this matter to Ira A. Wall, County Superintendent of Highways of Alexander County, as provided for in Section 84 of Chapter 121. Notice was given and a hearing was held by the County Superintendent in accordance with the Statute. At that time, Wall refused

and denied the Prayer of the Petition, reciting as his reason "lack of jurisdiction."

Petitioner then filed her Petition for the common law Writ of Certiorari in the Circuit Court of Alexander County. The Writ was granted and the bond fixed by the Court was filed and approved. There were further proceedings in which additional parties were added to the Writ; a return was filed by the County Superintendent of Highways and a motion to quash the return was subsequently filed.

The Circuit Court, on May 19, 1950, entered an Order in which it sustained Petitioner's motion to strike the return and it also upheld the Writ of Certiorari. In doing so the Court ruled that the County Superintendent of Highways had improperly and illegally held that he had no jurisdiction in this matter, and the Court ordered him to proceed according to law and file his decision within thirty days. No appeal was taken from this order.

On May 29th, the County Superintendent, filed a decision with the Clerk of the Circuit Court granting the road. On June 8th, which was within the thirty day period specified in the Court Order, the County Superintendent reversed himself and vacated and set aside his decision of May 29th. He stated that the earlier decision was made through error and misunderstanding; that he had not been fully advised in the premises; and that the decision had been erroneously filed with the Clerk of the Circuit Court instead of the Clerk of the Road District. On June 8th the County Superintendent also filed his decision with the Clerk of the Road District denying the road on its merits.

Following this last decision of the County Superintendent of Highways, Petitioner filed a motion to vacate the decision of the County Superintendent of June 8th which denied the road, and to confirm his earlier decision of May 29th which granted the road. The Circuit Court granted the motion on September 1st which in effect confirmed the

earlier decision of May 29th granting the road, and entered judgment for the Petitioner and against the respondent. This case comes to the Court on appeal from the judgment of September 1, 1950.

In considering this appeal the decisive question is the contention that the actions of a court, when concerned with a Writ of Certiorari, are strictly limited. It is well established that a court when confronted with a Petition for a Common Law Writ of Certiorari, has power only to quash the Writ or to quash the return. In Walker vs. Village of Morgan Park, 175 Ill. 575, 582, the Court expressed the limitations thus:

> "The Court cannot consider any matter not appearing of record, and if the want of jurisdiction or illegality appears from the record, the proper judgment is that the proceedings be quashed, but if the proceedings be regular, the Petition must be dismissed and the Writ quashed, and these are the only judgments that can be entered in this procedure."

See, also, People vs. Fisher, 373 Ill. 228, 234; People vs. Lindblom, 182 Ill. 241; and Superior Coal Company vs. O'Brien, 383 Ill. 394, 398.

Although there have been numerous laws passed granting the Court enlarged powers in certain cases under a statutory Writ of Certiorari, the powers with respect to the common law Writ Certiorari have never been changed. It follows, therefore, that the lower court in this case had the power only to quash the Writ or quash the return. Therefore, the Order of the Court entered on September 1, 1950, confirming the decision to allow the road and vacating the decision to deny the road, was clearly beyond its power. For that reason, the judgment of the Circuit Court of Alexander County must be reversed.

Judgment reversed.

(Abstract only)

Scheineman, P. J. and Culbertson, J. Concur

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D. 1951

343 I.A. 523

General No. 9753 Agenda No. 11

Fred E. Green, Plaintiff-Appellee, vs. Hawkeye Casualty Company, a Foreign Insurance Company, Defendant-Appellant.	Appeal from Circuit Court of Sangamon County

Wheat, J.

This is an action by plaintiff-appellee Fred E. Green against defendant-appellant Hawkeye Casualty Company, in an action upon an insurance policy to compensate plaintiff for damages to his automobile. The jury returned a verdict in plaintiff's favor in the sum of $1,135.16. Upon denial of motion for judgment notwithstanding the verdict and for new trial, the Court deducted $15.16 from the jury's verdict and entered judgment in the sum of $1,120.00. This appeal follows.

The complaint charged that on February 2, 1949, defendant issued its policy insuring plaintiff against damages arising out of collision or upset of his automobile; that on April 25, 1949, such automobile was overturned and damaged and that defendant did not reimburse plaintiff for his said loss in the sum of $1,865.00 or for loss of use therein in the additional

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D.1951

General No. 8703 Agenda No. 11

Fred E. Green, Plaintiff-Appellee, vs. Hawkeye Casualty Company, a Foreign Insurance Company, Defendant-Appellant.	Appeal from Circuit Court of Sangamon County

Wheat, J.

This is an action by plaintiff-appellee Fred E. Green against defendant-appellant Hawkeye Casualty Company, in an action upon an insurance policy to compensate plaintiff for damage to his automobile. The jury returned a verdict in plaintiff's favor in the sum of $1,535.15. Upon denial of motion for judgment notwithstanding the verdict and for new trial, the Court deducted $15.15 from the jury's verdict and entered judgment in the sum of $1,520.00. This appeal follows.

The complaint charged that on February 2, 1949, defendant issued its policy insuring plaintiff against damages arising out of collision or upset of his automobile; that on April 25, 1949, such automobile was overturned and damaged and that defendant did not reimburse plaintiff for his said loss in the sum of $1,865.00 or for loss of use therein in the additional

sum of $900.00. Defendant by its answer admitted the issuance of the policy and that plaintiff's automobile had been damaged, and by way of affirmative defense alleged that such automobile was repaired in good order as provided in the policy and that plaintiff refused to accept it and attempted to abandon it to the defendant; also that plaintiff was given an option to receive payment for his loss in cash or to have his car repaired and elected to have the repairs made, which was done a short time thereafter. The reply of plaintiff denied such affirmative defenses and alleged that defendant offered the plaintiff the option of receiving a payment in cash for a sum less than the loss sustained, or having the automobile repaired in good order.

Defendant contends that the sole issue was as to whether the car was repairable and was repaired properly, and that as the Court withdrew the issue of repairability from consideration of the jury, the only question remaining was as to the amount. Defendant then refers to a stipulation entered into before trial in open court wherein counsel for plaintiff and defendant agreed as follows: "It is stipulated and agreed between the parties that in the event of a trial of this case upon the issue as to whether or not plaintiff's car was repairable, and the jury should find that it was repairable, that the defendant will pay the plaintiff the amount of the repair bill of $729.84, less $50.00, which is deductible under the terms of the policy." Defendant had assumed liability of such amount at all times and had become liable therefor to the garage where the repairs were made, and thus moved for a directed verdict at the close of plaintiff's evidence and renewed such motion at the close of all the evidence, both of which motions were denied.

sum of $500.00. Defendant by its answer admitted the issuance of the policy and that plaintiff's automobile had been damaged, and by way of affirmative defense alleged that such automobile was repaired in good order as provided in the policy and that plaintiff refused to accept it and attempted to abandon it to the defendant; also that plaintiff was given an option to receive payment for his loss in cash or to have his car repaired and elected to have the repairs made, which was done a short time thereafter. The reply of plaintiff denied such affirmative defenses and alleged that defendant offered the plaintiff the option of receiving a payment in cash for a sum less than the loss sustained, or having the automobile repaired in good order.

Defendant contends that the sole issue was as to whether the car was repairable and was repaired properly, and that as the court withdrew the issue of repairability from consideration of the jury, the only question remaining was as to the amount. Defendant then refers to a stipulation entered into before trial in open court wherein counsel for plaintiff and defendant agreed as follows: "It is stipulated and agreed between the parties that in the event of a trial of this case upon the issue as to whether or not plaintiff's car was repairable, and the jury should find that it was repairable, that the defendant will pay the plaintiff the amount of the repair bill of $729.84, less $50.00, which is deductible under the terms of the policy." Defendant had assumed liability of such amount at all times and had become liable therefor to the garage where the repairs were made, and thus moved for a directed verdict at the close of plaintiff's evidence and renewed such motion at the close of all the evidence, both of which motions were denied.

Plaintiff contends that the question at issue was: "Did the insurer restore the car to a condition that made it equal to what it was before the accident?" (Page 2 of Brief). Again plaintiff contends: "The question was whether it had replaced the car so that it was substantially as good as it was at the time of the accident." (Page 6 of Brief). It seems that there is little dispute between the parties as to this being the issue, and to the Court it seems that this is settled in defendant's favor by the stipulation above set forth. Otherwise the stipulation would be meaningless.

Plaintiff contends that another issue in the case involved damages for loss of use of his automobile because of the unreasonable delay of defendant in making repairs. The trial court refused to admit evidence relating to this. If such ruling were erroneous, plaintiff states in the closing paragraph of his brief that he purposely waives the same.

In proceedings following the verdict of the jury, it appears that defendant has paid its liability for the repair bill as provided in the stipulation.

By reason of the foregoing the judgment of the Circuit Court is reversed.

Reversed.

Plaintiff contends that the question at issue was: "did the insurer restore the car to a condition that made it equal to what it was before the accident?" (Page 2 of Brief). Again plaintiff contends: "The question was whether it had restored the car so that it was substantially as good as it was at the time of the accident." (Page 6 of Brief). It seems that there is little dispute between the parties as to this being the issue, and to the Court it seems that this is settled in defendant's favor by the stipulation above set forth. Otherwise the stipulation would be meaningless.

Plaintiff contends that another issue in the case involved damages for loss of use of his automobile because of the unreasonable delay of defendant in making repairs. The trial court refused to admit evidence relating to this. If such ruling were erroneous, plaintiff states in the closing paragraph of his brief that he purposely waives the same.

In proceedings following the verdict of the jury, it appears that defendant has paid its liability for the repair bill as provided in the stipulation.

By reason of the foregoing the judgment of the circuit Court is reversed.

Reversed.

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D. 1951

General No. 9757 Agenda No. 14

Fred I. Evans, Plaintiff-Appellee, vs. Paul F. Beich Company, a Corporation, Defendant-Appellant.	Appeal from Circuit Court of McLean County

Wheat, J.

In this action Fred I. Evans, plaintiff-appellee, seeks to recover damages from Paul F. Beich Company, a corporation, defendant-appellant, for breach of his alleged contract of employment. On the first trial of the case the trial court directed a verdict for defendant, which upon appeal was reversed, and the cause remanded, this Court holding that on the evidence presented, the subject was properly a question for the jury. (Evans v. Beich, 337 Ill.App.98). Upon a retrial of the case, the jury awarded plaintiff $2,500.00. Upon denial of motion for judgment notwithstanding the verdict and motion for new trial, judgment was entered in the sum of $2,500.00 and this appeal follows.

It is first argued that on the question of the authority of the agent of the defendant, Morris, to hire the plaintiff, the verdict is contrary to the manifest weight of the evidence. The substance of plaintiff's proof on this subject is generally similar to that introduced in the first trial, which is set forth in this Court's opinion, so that it will be unnecessary to repeat it.

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D.1951

General No. 9717 Abstract No. 14

Fred I. Evans, Plaintiff-Appellee, vs. Paul F. Belch Company, a Corporation, Defendant-Appellant.	Appeal from Circuit Court of Bureau County

Sheet, 4.

In this action Fred I. Evans, plaintiff-appellee, seeks to recover damages from Paul F. Belch Company, a corporation, defendant-appellant, for breach of its alleged contract of employment. On the first trial of the case the trial court directed a verdict for defendant, which upon appeal was reversed, and the cause remanded, this Court holding that on the evidence presented, the contract was properly a question for the jury. (Evans v. Belch, 327 Ill.App.99). Upon a retrial of the case, the jury awarded plaintiff $2500.00. Upon denial of motion for judgment notwithstanding the verdict and motion for new trial, judgment was entered in the sum of $2500.00 and this appeal follows.

It is first argued that on the question of the authority of the agent of the defendant, Morris, to hire the plaintiff, the verdict is contrary to the manifest weight of the evidence. The substance of plaintiff's proof on this subject is generally similar to that introduced in the first trial, which is set forth in this Court's opinion, so that it will be unnecessary to repeat it.

It was in some respects strengthened upon the second trial, in that plaintiff's witness Wolfgang testified that at a candy dealer's convention in the spring of 1945, defendant's agent Morris, who allegedly hired plaintiff, told his immediate superior O'Malley that he had hired Wolfgang as a salesman for the State of Ohio, and that although O'Malley (who at such time was sale's manager for defendant company) questioned Wolfgang's ability to handle the territory, he did not disaffirm Morris's authority to hire salesmen.

Defendant's proof relates primarily to the question whether its agent, Morris, had authority to hire salesmen. Its witnesses Carl Behr (general sales and advertising manager), Charles O'Malley (sales manager), Otto Beich (Board Chairman) and Frank Morris (who allegedly hired plaintiff and who was territory salesman for the State of Ohio), all testified in substance that it was the policy of defendant to engage salesmen through its agents in the home office at Bloomington, Illinois, that the defendant did not have men in the field authorized to employ salesmen, and that Morris had no such power.

At least inferentially in conflict with this testimony is that of plaintiff concerning his conference in O'Malley's office in January, 1946, in which the latter upon being advised that Morris had employed plaintiff, did not deny Morris's authority to do so. He also testified that in a three way telephone conversation which took place at that time, among himself, O'Malley and Morris, the latter asked O'Malley whether he was "supposed to line up any more of these junior salesmen", and that O'Malley replied: "Yes, but for heaven's sake don't give them any more start-

It was in some respects strengthened upon the second trial, in that plaintiff's witness Pulgrano testified that in a study dealer's convention in the spring of 1945, defendant's agent Morris, who allegedly hired plaintiff, told his immediate superior O'Malley that he was hired "primarily as a salesman for the State of Ohio, and then although O'Malley (who at such time was acting manager for defendant company) questioned Pulgrano's ability to handle the territory, he did not disaffirm Morris's authority to hire salesmen.

Defendant's proof relates primarily to the question whether its agent, Morris, had authority to hire salesmen. Its witnesses Carl Weir (general sales and advertising manager), Charles O'Malley (sales manager), Otto Bolch (Board Chairman) and Frank Morris (who allegedly hired plaintiff and who was territory salesman for the State of Ohio), all testified in substance that it was the policy of defendant to engage salesmen through its agents in the home office at Bloomington, Illinois, that the defendant did not make men in the field authorized to employ salesmen, and that Morris had no such power.

At least interestingly in conflict with this testimony is that of plaintiff concerning his conference in O'Malley's office in January, 1946, in which the latter upon being advised that Morris had employed plaintiff, did not deny Morris's authority to do so. He also testified that in a three-way telephone conversation which took place at that time, among himself, O'Malley and Morris, the latter asked O'Malley whether he was "supposed to line up any more of these junior salesmen", and that O'Malley replied: "Yes, but for heaven's sake don't give them any more start-

ing dates". The jury might well have found significant the fact that though Morris testified that he never told plaintiff that he was authorized to employ salesmen, he did not contradict plaintiff's testimony that he, Morris, told plaintiff in August, 1945, that plaintiff's application had been approved and that he was to start work on September 15, 1945. It is urged that plaintiff has been successfully impeached so that his testimony was not worthy of consideration. Any minor discrepancies in his testimony are readily explainable to the extent that there is no merit in defendant's contention.

As to whether Morris had actual or apparent authority to hire plaintiff on behalf of defendant, and as to whether plaintiff was justified and did rely thereon, it cannot be said that the verdict of the jury was contrary to the manifest weight of the evidence.

It is urged that the verdict was the result of passion and prejudice. It is evident that some considerable animosity existed between the parties to the case. However, all objections of defendant were sustained and the jury instructed to disregard incompetent matter. It appears that the trial court made every reasonable effort to conduct a fair and impartial trial, and in fact, succeeded. There is no evidence of any deliberate design to improperly influence the jury through a continued and willful course of prejudicial conduct, and by reason of the conduct of the trial court, it does not appear that the jury could have been improperly influenced by the matters concerning which defendant complains.

Complaint is made as to the giving and refusing of instructions. With the exception of the giving of plaintiff's instruction No. 5, no error occurred in such giving or refusing of instructions.

any daters". The jury might well have found significant the fact that though Morris testified that he never told plaintiff that he was summoned to supply evidence, he did not contradict plaintiff's testimony that he, Morris, told plaintiff in August, 1945, that plaintiff's qualification had been approved and that he was to start work on September 15, 1945. It is urged that plaintiff has been successfully impeached so that his testimony was not worthy of consideration. Any minor discrepancies in his testimony are readily explainable to the extent that there is no merit in defendant's contention.

As to whether Morris had actual or apparent authority to hire plaintiff on behalf of defendant, and as to whether plaintiff was justified and did rely thereon, it cannot be said that the verdict of the jury was contrary to the manifest weight of the evidence.

It is urged that the verdict was the result of passion and prejudice. It is evident that some considerable animosity existed between the parties to the case. However, all objections of defendant were sustained and the jury instructed to disregard incompetent matter. It appears that the trial court made every reasonable effort to conduct a fair and impartial trial, and in fact, succeeded. There is no evidence of any deliberate design to improperly influence the jury through a continued and willful course of prejudicial conduct, and or reason of the conduct of the trial court, it does not appear that the jury could have been improperly influenced by the matters concerning which defendant complains.

Complaint is made as to the giving and refusing of instructions. With the exception of the giving of plaintiff's instruction No. 3, no error occurred in such giving or refusing of instructions.

As to the argument that the verdict is against the manifest weight of the evidence as to damages, it does not appear that any evidence was adduced as to the amount of wages to be paid plaintiff. Specifically, plaintiff remarks in his brief: "We had thought that the record included it, but we are compelled to confess to the court that there is no evidence of compensation to be paid in the record filed in this court". The verdict cannot be sustained in so far as it may include damages for unpaid wages. For that reason plaintiff's instruction No. 5 should not have been given. This was a standard instruction as to damages but improperly included plaintiff's loss of earnings under his contract with defendant. Plaintiff contends that if this Court holds that the verdict is excessive in amount, "plaintiff ought to remit $1020.00, the remaining $1480.00 being demonstrable damage". The complaint, the testimony, defendant's brief and that part of plaintiff's closing argument which is abstracted, indicate that the latter item of $1480.00 relates to plaintiff's loss on the purchase and resale of a certain house trailer and his expense in moving from Warren, Ohio, to Indianapolis, Indiana.

The only evidence on this subject is that of plaintiff, from which it appears that he discussed the matter of the trailer purchase with Morris. Plaintiff proposed that he buy the trailer to house his family at the new location and requested that Morris approve the purchase. He states that Morris inspected the trailer and said:"You have done the right thing, by all means buy it". Plaintiff also testified that Morris stated that defendant company would defray the expense of moving his family, by reason of which

As to the argument that the verdict is against the preponderance of the evidence as to damages, it does not appear that any evidence was adduced as to the amount of wages to be paid plaintiff. Specifically, plaintiff testified in his behalf: "He said though that the record included it, but we are compelled to confess to the court that there is no evidence of compensation to be paid in the record filed in this court". The verdict cannot be sustained in so far as it may include damages for unpaid wages. For this reason plaintiff's instruction No. 2 should not have been given. This was a standard instruction as to damages but improperly included plaintiff's loss of earnings under his contract with defendant. Plaintiff contends that if this Court holds that the verdict is excessive in amount, "plaintiff ought to remit $2000.00, the remaining $2450.00 being demonstrable damage". The complaint, the testimony, defendant's trial and that part of plaintiff's closing argument which is abstracted, indicates that the latter item of $2450.00 relates to plaintiff's loss on the purchase and resale of a certain house, trailer and his expense in moving from Warren, Ohio, to Indianapolis, Indiana.

The only evidence on this subject is that of plaintiff, from which it appears that he discussed the matter of the trailer purchase with Morris. Plaintiff proposes that he buy the trailer to house his family at the new location and represented that Morris approves the purchase. He states that Morris inspected the trailer and said:"You have done the right thing, by all means buy it". Plaintiff also testified that Morris stated that defendant company would defray the expense of moving his family, by reason of which

he purchased the trailer and accessories for $2800.00. He further testified that about the first of December, having heard nothing from Morris or defendant company, he travelled with the trailer to Florida in search of work; that while there he ran short of money, advertised the trailer for sale, and sold it for $1400.00, his loss being $1400.00. The remaining $80.00 of "demonstrable damages" apparently consists of the expense of meals and lodging which plaintiff expended in transporting himself and family from Ohio to Indiana, in preparation of undertaking his employment with defendant company. Although the proof as to these items is meager, it is not controverted in any way except by argument, and in the opinion of the Court was sufficient to support the finding of the jury.

Defendant contends that the amount of the verdict was so clearly against the manifest weight of the evidence, that, as was held in the case of Roedler v. Vandalia Bus Lines, Inc., 281 Ill.App.520, "the error cannot be cured by a remittitur, for the reason that the finding of other material facts, essential to the issue, if not the issue itself, may have been influenced by such improper elements." It is the opinion of the Court that the elements of damages in this case are not so inter-related that recovery of any damages must be denied because of complete failure of proof as to a part thereof.

If the judgment of the trial court is to be affirmed, there must be a remittitur in the sum of $1020.00 reducing the judgment to $1480.00. If such is done within thirty days judgment in the sum of $1480.00 will be and is affirmed. If not the judgment of the Circuit Court will be and is reversed and the cause remanded for a new trial.

Affirmed upon remittitur, otherwise reversed and remanded.

he purchased the trailer and accessories for $4,000.00. He further testified that about the first of December, having heard nothing from Morris or defendant company, he travelled with the trailer to Florida in search of work; that while there he ran short of money, advertised the trailer for sale, and sold it for $1,000.00, the loss being $3,000.00. The remaining $30.00 of "incidentals damages" apparently consists of the expense of meals and lodging which plaintiff expended in transporting himself and family from Ohio to Indiana, in preparation of undertaking his employment with defendant company. Although the proof as to these items is meager, it is not controverted in any way except by argument, and in the opinion of the Court was sufficient to support the finding of the jury.

Defendant contends that the amount of the verdict was so clearly against the manifest weight of the evidence, that, as was held in the case of Moeller v. Tavlorville Gas Light Co., 121 Ill.App.520, "the error cannot be cured by a remittitur, for the reason that the finding of other material facts, essential to the issue, if not the issue itself, may have been influenced by such improper evidence." It is the opinion of the Court that the elements of damages in this case are not so inter-related that recovery of any damages must be denied because of complete failure of proof as to a part thereof.

If the judgment of the trial court is to be affirmed, there must be a remittitur in the sum of $1000.00 reducing the judgment to $1,480.00. If such is done within thirty days judgment in the sum of $1,480.00 will be and is affirmed. If not the judgment of the Circuit Court will be and is reversed and the cause remanded for a new trial.

Affirmed upon remittitur, otherwise reversed and remanded.

No. 10429

In the

APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1950

343 I.A. 643

ELIZABETH DOUBLER, Plaintiff-Appellant, vs. HARRY DOUBLER and IRVIN DOUBLER, Executors of the Last Will and Testament of William Doubler, Deceased, Defendants-Appellees.	Appeal from the Circuit Court of Stephenson County. Honorable Harry E. Wheat, Presiding Judge.

BRISTOW, J. — On June 4, 1949, Elizabeth Doubler filed her complaint in the Circuit Court of Stephenson County against the Executors of the Last Will of William Doubler, deceased, alleging--that William Doubler died in May, 1943, and at the time of his death there was on deposit in a savings account in the Lena State Bank, Lena, Illinois, the principal sum of $3,069.35 and $117.05 interest, and that said account was in the name of Wm. Doubler or Mrs. Elizabeth Doubler, payable to either of them or the survivor with full survivorship rights; that the bank refused to pay the said sums of money to her because the Executors of the Estate had notified them that they were claiming said sums of money as being the

No. 10429

In the

APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1950

ELIZABETH DOUBLER,	Appeal from the
Plaintiff-Appellant,	Circuit Court of
vs.	Stephenson County.
HARRY DOUBLER and IRVIN DOUBLER, Executors of the Last Will and Testament of William Doubler, Deceased,	Honorable Harry B. Wheat,
Defendants-Appellees.	Presiding Judge.

BRISTOW, J. — On June 4, 1949, Elizabeth Doubler filed her complaint in the Circuit Court of Stephenson County against the Executors of the last Will of William Doubler, deceased, alleging--that William Doubler died in May, 1943, and at the time of his death there was on deposit in a savings account in the Lena State Bank, Lena, Illinois, the principal sum of $3,069.35 and $117.05 interest, and that said account was in the name of Wm. Doubler or Mrs. Elizabeth Doubler, payable to either of them or the survivor with full survivorship rights; that the bank refused to pay the said sums of money to her because the Executors of the Estate had notified them that they were claiming said sums of money as being the

property of the Estate. The complaint prayed for a determination of rights in the bank account.

The Lena State Bank paid to the Clerk of the Circuit Court the amount of money in controversy, to abide the Court decree.

The Executors of the Estate of William Doubler answered the complaint by denying that the plaintiff was entitled to the deposit because there was no joint tenancy legally created and consequently there was no right of survivorship in her.

After hearing testimony, the Court determined that the plaintiff was not entitled to the bank deposit in question, but that it was the property of the Estate. This appeal followed.

The principal facts adduced on the trial are as follows:

William Doubler, on December 16, 1938, opened a savings account in the Lena State Bank in the sum of $1200.00, at which time a pass book was issued in his name and the bank opened an account sheet entitled Wm. Doubler, and that deposits and withdrawals were made at irregular intervals until the time of his death. Shortly before William Doubler went to the hospital, which was for only a brief period, he and Mrs. Doubler went to the bank and had Clarence W. Yeager, who was a witness on the trial, write the following upon the pass book and just above the name of Wm. Doubler-- "Payable to either of them with full survivorship rights" and immediately after the name of Wm. Doubler was added the words "or Mrs. Elizabeth Doubler;" that the above changes were made at the direction of William Doubler and in the presence of Elizabeth Doubler. At some time, not known by the bank officials, the bank sheet was corrected to correspond with the bank book. Thereafter, Mrs. Doubler made withdrawals from that account. There was no joint signature card or any instrument in writing executed by Mr. and Mrs. Doubler other than what has been indicated above. There is no evidence as to whose money it was that composed the original deposit of $1200.00, and the same is true of the subsequent deposits. For the creation of joint accounts the cashier of the bank testified that there was no uniform practice, that he wasn't sure about whether William Doubler signed a signature card. At any rate, there was none found.

property of the Estate. The complaint prayed for a determination of rights in the bank account.

The Iowa State Bank paid to the Clerk of the Circuit Court the amount of money in controversy, to abide the Court decree.

The Executors of the Estate of William Doubler answered the complaint by denying that the plaintiff was entitled to the deposit because there was no joint tenancy legally created and consequently there was no right of survivorship in her.

After hearing testimony, the Court determined that the plaintiff was not entitled to the bank deposit in question, but that it was the property of the Estate. This appeal followed.

The principal facts adduced on the trial are as follows:

William Doubler, on December 15, 1938, opened a savings account in the Iowa State Bank in the sum of $1200.00, at which time a pass book was issued in his name and the bank opened an account sheet entitled Wm. Doubler, and that deposits and withdrawals were made at irregular intervals until the time of his death. Shortly before William Doubler went to the hospital, which was for only a brief period, he and Mrs. Doubler went to the bank and had Clarence W. Yeager, who was a witness on the trial, write the following upon the pass book and just above the name of Wm. Doubler-- "Pay to either of them with full survivorship rights" and immediately after the name of Wm. Doubler was added the words "or Mrs. Elizabeth Doubler;" that the above changes were made at the direction of William Doubler and in the presence of Elizabeth Doubler. At some time, not known by the bank officials, the bank sheet was corrected to correspond with the bank book. Thereafter, Mrs. Doubler made withdrawals from that account. There was no joint signature card or any instrument in writing executed by Mr. and Mrs. Doubler other than what has been indicated above. There is no evidence as to whose money it was that composed the original deposit of $1200.00, and the same is true of the subsequent deposits. For the creation of joint accounts the cashier of the bank testified that there was no uniform practice, that he wasn't sure about whether William Doubler signed a signature card. At any rate, there was none found.

The sole inquiry presented on this appeal is whether under the foregoing undisputed facts a joint bank account was legally created whereby upon the death of William Doubler it survived to his widow.

A determination of this question compels a construction of Sec. 2, Chapter 76 of Ill. Rev. Stats., which reads as follows:

> "that when a deposit in any bank or trust company transacting business in this State has been made or shall hereafter be made in the names of two or more persons payable to them when the account is opened or thereafter, such deposit or any part thereof or any interest or dividend thereon, may be paid to any one of said persons whether the other or others be living or not, and when an agreement permitting such payment is signed by all said persons at the time the account is opened or thereafter the receipt or acquittance of the person so paid shall be valid and sufficient discharge from all parties to the bank for any payments so made."

It is apparent that there are two separate provisos in the foregoing enactment, and it is the contention of the appellee that since there is no compliance with the second proviso that a joint tenancy in the bank account is not created in the instant case.

It is the opinion of this Court that a complete answer to this argument is found in the case of Vaughan v. Millikin State Bank, 263 Ill. App. 301. In that case the survivor signed nothing. The creator of the account, however, signed a joint tenancy card and on the card was stamped "joint owners payable to either or the survivor" and also complied with other formalities required by the bank for the creation of such joint account. There was no evidence that the one claiming as a survivor knew of the existence of the account. In that case the same argument was advanced--namely, there was no compliance with the second proviso of Sec. 2, Chapter 76, and upon this question at pages 304, 305, and 306 the Court said:

> "The appellant contends, for reversal of the judgment, that the right to withdraw the funds in the joint account mentioned which the appellee Clark had, did not survive to her at the death of Miss Locklin; that under the Act of the General Assembly in force and effect after June 30, 1919, Cahill's St. ch. 76, par. 1 et seq., to revise the law in relation to joint rights and obligations, the survival

The sole inquiry presented on this appeal is whether under the foregoing undisputed facts a joint bank account was legally created whereby upon the death of William Doubler it survived to his widow.

A determination of this question compels a construction of Sec. 2, Chapter 76 of Ill. Rev. Stats., which reads as follows:

> "that when a deposit in any bank or trust company transacting business in this State has been made or shall hereafter be made in the names of two or more persons payable to them when the account is opened or thereafter, such deposit or any part thereof or any interest or dividend thereon, may be paid to any one of said persons whether the other or others be living or not, and when an agreement permitting such payment is signed by all said persons at the time the account is opened or thereafter the receipt or acquittance of the person so paid shall be valid and sufficient discharge from all parties to the bank for any payments so made."

It is apparent that there are two separate provisos in the foregoing enactment, and it is the contention of the appellee that since there is no compliance with the second proviso that a joint tenancy in the bank account is not created in the instant case.

It is the opinion of this Court that a complete answer to this argument is found in the case of Vaughan v. Milliken State Bank, 263 Ill. App. 301. In that case the survivor signed nothing. The creator of the account, however, signed a joint tenancy card and on the card was stamped "joint owners payable to either or the survivor" and also complied with other formalities required by the bank for the creation of such joint account. There was no evidence that the one claiming as a survivor knew of the existence of the account. In that case the same argument was advanced--namely, there was no compliance with the second proviso of Sec. 2, Chapter 76, and upon this question at pages 304, 305, and 306 the Court said:

> "The appellant contends, for reversal of the judgment, that the right to withdraw the funds in the joint account mentioned which the appellee Clark had, did not survive to her at the death of Miss Lockhin; that under the Act of the General Assembly in force and effect after June 30, 1919, Cahill's St. ch. 76, par. 1 et seq., to revise the law in relation to joint rights and obligations, the survival

of the right was dependent upon her having signed the mutual agreement on the so-called joint tenancy card, hereinbefore set forth; and that she did not sign the same; and this is the vital question presented for review on this appeal.

The determination of that question involves a construction of section 2 of the legislative act referred to, Cahill's St. ch. 76, par. 2, which has reference to the right of survivorship in personal property as joint tenants or owners. It is evident that it was the intention of the legislature by the enactment of section 2 to abolish the right incident to the right of survivorship as between joint tenants and owners of personal property, 'except as to executors and trustees, and except also where by will or other instrument in writing expressing an intention to create a joint tenancy in personal property with the right of survivorship.' But there is a special proviso in the section, in reference to bank deposits, which is the subject matter of this suit, namely: 'That when a deposit in any bank or trust company transacting business in this State has been made or shall hereafter be made in the names of two or more persons payable to them when the account is opened or thereafter, such deposit or any part thereof or any interest or dividend thereon, may be paid to any one of said persons whether the other or others be living or not'; then there is another clause added to the proviso: 'And when an agreement permitting such payment is signed by all said persons at the time the account is opened or thereafter the receipt or acquittance of the person so paid shall be valid and sufficient discharge from all parties to the bank for any payments so made.' It will be noted that in the body of the proviso the right of survivorship is definitely and unconditionally preserved to the joint depositors for that purpose; and the clause attached as a part of the proviso refers to what shall be deemed a sufficient discharge of the bank for the payments made by it. But we are of the opinion that under the proviso referred to, concerning joint deposits in banks, no instrument in writing expressing an intention to create joint tenancy is necessary to create such joint ownership and right of ownership in the deposits made on joint account, as stated in the proviso. But the fact that the deposit has been made by arrangement and agreement with the bank in the names of two or more persons, so as to be payable to them, or either of them in accordance with the proviso, the joint ownership of such deposit or any part thereof or any interest or dividend thereon becomes vested in the persons in whose names the deposits are made; the added clause does not in any way qualify or restrict the right of payment or the right to withdraw the deposits in the persons named in the joint account after the death of one of the joint depositors; but the writing referred to when signed by all the persons named in the account merely provides an additional safeguard to the bank by providing that when such agreement is signed by all the persons named in the joint account, the receipt or acquittance of any of the persons named in the account who are paid shall be a valid and sufficient discharge from all parties to the bank for any payments so made; that is to say, the receipt or acquittance of one shall be considered in effect the receipt of all."

of the right was dependent upon her having signed the mutual agreement on the so-called joint tenancy card, hereinbefore set forth; and that she did not sign the same; and this is the vital question presented for review on this appeal.

The determination of that question involves a construction of section 2 of the legislative act referred to, Cahill's St. ch. 76, par. 2, which has reference to the right of survivorship in personal property as joint tenants or owners. It is evident that it was the intention of the legislature by the enactment of section 2 to abolish the right incident to the right of survivorship as between joint tenants and owners of personal property, 'except as to executors and trustees, and except also where by will or other instrument in writing expressing an intention to create a joint tenancy in personal property with the right of survivorship.' But there is a special proviso in the section, in reference to bank deposits, which is the subject matter of this suit, namely: 'That when a deposit in any bank or trust company transacting business in this State has been made or shall hereafter be made in the names of two or more persons payable to them when the account is opened or thereafter, such deposit or any part thereof or any interest or dividend thereon, may be paid to any one of said persons whether the other or others be living or not'; then there is another clause added to the proviso: 'And when an agreement permitting such payment is signed by all said persons at the time the account is opened or thereafter the receipt or acquittance of the person so paid shall be valid and sufficient discharge from all parties to the bank for any payments so made.' It will be noted that in the body of the proviso the right of survivorship is definitely and unconditionally preserved to the joint depositors for that purpose; and the clause attached as a part of the proviso refers to what shall be deemed a sufficient discharge of the bank for the payments made by it. But we are of the opinion that under the proviso referred to, concerning joint deposits in banks, no instrument in writing expressing an intention to create joint tenancy is necessary to create such joint ownership and right of ownership in the deposits made on joint account, as stated in the proviso. But the fact that the deposit has been made by arrangement and agreement with the bank in the names of two or more persons, so as to be payable to them, or either of them in accordance with the proviso, the joint ownership of such deposit or any part thereof or any interest or dividend thereon becomes vested in the persons in whose names the deposits are made; the added clause does not in any way qualify or restrict the right of payment or the right to withdraw the deposits in the persons named in the joint account after the death of one of the joint depositors; but the writing referred to when signed by all the persons named in the account merely provides an additional safeguard to the bank by providing that when such agreement is signed by all the persons named in the joint account, the receipt or acquittance of any of the persons named in the account who are paid shall be a valid and sufficient discharge from all parties to the bank for any payments so made; that is to say, the receipt or acquittance of one shall be considered in effect the receipt of all."

Appellee in his brief seeks to distinguish the Vaughan case on the ground that William Doubler did not go through all the formalities that were required by the Millikin National Bank. There is no question but what in the instant case he did comply with all the requirements as were then in operation at the Lena State Bank. William Doubler directed the assistant cashier to write on the pass book the words hereinbefore indicated which clearly evidence an intention on his part to create a joint account. The bank sanctioned and fully approved this mode of creating a joint account by writing upon the deposit sheet the same language as it was directed to write upon the pass book.

In analyzing this question, the cases of Ervin v. Felter, 283 Ill. 36; Bolton v. Bolton, 306 Ill. 473; Illinois Trust & Savings Bank v. Van Vlack, 310 Ill. 185 can be helpfully considered.

We conclude, therefore, that Elizabeth Doubler is entitled to money deposited with the clerk, and that no part of same is the property of the Doubler Estate.

JUDGMENT REVERSED.

Appellee in his brief seeks to distinguish the Vaughan case on the ground that William Doubler did not go through all the formalities that were required by the Mulkin National Bank. There is no question but that in the instant case he did comply with all the requirements as were then in operation at the Iona State Bank. William Doubler directed the assistant cashier to write on the pass book the words hereinbefore indicated which clearly evidence an intention on his part to create a joint account. The bank sanctioned and fully approved this mode of creating a joint account by writing upon the deposit sheet the same language as it was directed to write upon the pass book.

In analyzing this question, the cases of Ervin v. Teiter, 285 Ill. 36, Dolton v. Dolton, 306 Ill. 472; Illinois Trust & Savings Bank v. Van Vlack, 310 Ill. 185 can be helpfully considered.

We conclude, therefore, that Elizabeth Doubler is entitled to money deposited with the clerk, and that no part of same is the property of the Doubler Estate.

JUDGMENT REVERSED.

45018

BENJAMIN PERRY, Appellee and Cross-Appellant, v. ELIZABETH PERRY, etc., LORINDA PERRY, EUGENE B. PERRY, et al., Appellants. WILLIAM W. CURRAN, Cross-Appellant	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On September 28, 1931, Elizabeth Perry, the widow of Eugene B. Perry, of Chicago, executed a revocable trust instrument naming her daughter Elizabeth Perry, a spinster, as trustee. The settlor was then 84 years of age and had been a widow for 26 years. The beneficiaries of the trust were Benjamin Perry, Wilson James Perry, Sr., (now deceased), Josephine Perry, (now deceased) and Lorinda, Elizabeth and Eugene B. Perry, the children of the settlor. Wilson James Perry died August 10, 1933, leaving him surviving his widow, Ida P. Perry, his daughter, Elizabeth Primrose Perry, now married to Roger K. Hammerstrom, and his son, Wilson James Perry, Jr. At the time of his death, Wilson James Perry resided in Billings, Montana, where his widow still lives. On February 12, 1934, the trust agreement was amended and made irrevocable. Certain provisions as to the Roberts farm, which farm is part of the assets of the E. B. Perry estate, were eliminated. Provisions were made continuing in trust the shares of Elizabeth Primrose Perry, now

Elizabeth Perry Hammerstrom, and Wilson James Perry, Jr., grandchildren of the settlor, until they reach the age of 25 years. Elizabeth Perry Hammerstrom became 25 years old on July 15, 1948, and Wilson James Perry, Jr., will reach that age on May 18, 1953. The settlor died on May 9, 1936, intestate. Josephine Perry died May 15, 1943, leaving her surviving no child or children and not having appointed by will to whom her share of the trust should be paid or distributed, as provided in the trust instrument, her share lapsed and became a part of the corpus of the trust estate. Elizabeth Perry, the trustee, was duly appointed and is acting as administratrix of the estate of Josephine Perry, deceased.

All the beneficiaries under the original trust agreement were well trained in professions or in public service. Benjamin Perry has degrees in pharmacy and medicine from the University of Illinois and in law from Northwestern University, and is a duly licensed attorney at law, physician and pharmacist in this State. Wilson James Perry was during his lifetime, and Eugene B. Perry is, a physician and surgeon. Josephine Perry served two terms in the Illinois General Assembly. Elizabeth Perry, the trustee, is a lawyer and was employed for several years as attorney for the Cook County Bureau of Public Welfare to enforce orders of court after a decree of divorce or separate maintenance for the support of minor children. Lorinda Perry is a member of the bar of the State of Illinois.

On March 31, 1947, Benjamin Perry filed a complaint in equity in the Circuit Court of Cook County against Elizabeth Perry, as trustee, individually and as administratrix of the estate of Josephine Perry, deceased, for an accounting by her as trustee, and named as additional defendants, Eugene B. Perry, Lorinda Perry, Elizabeth Perry Hammerstrom and Wilson James Perry, Jr., beneficiaries of the trust, and Ida P. Perry, an agent of the trustee in the State of Montana. Elizabeth Perry, Lorinda Perry and Eugene B. Perry, residents of this state, were personally served. Ida P. Perry, Wilson James Perry, Jr., and Elizabeth Perry Hammerstrom, nonresidents, were served by publication. On December 4, 1947, a guardian ad litem was appointed to represent Wilson James Perry, Jr., a minor. Elizabeth Perry Hammerstrom appeared by attorney. Ida P. Perry entered no appearance and was defaulted on December 4, 1947. A motion to strike the complaint on the ground, among others, that not all of the essential parties were properly before the court, was denied. The guardian ad litem and all the adult defendants, except Ida P. Perry, filed answers to the complaint. Defendant, Elizabeth Perry, in her several capacities, denied all allegations of wrongdoing and also denied that plaintiff was entitled to an accounting. Lorinda Perry and Eugene B. Perry also joined issue on many of the allegations and charges. Elizabeth Perry Hammerstrom admitted all the factual allegations of the complaint.

After the parties had looked at a proposed decree prepared by counsel for plaintiff, counsel associated with the trustee advised the court that she thought the question of the plaintiff's right to an accounting should be referred to a master. The order of reference was entered on that question. The master filed a report finding that at various times the trustee had permitted her sisters, Lorinda and Josephine Perry, to deposit trust funds in their personal bank accounts, and have placed trust funds, her own personal funds and funds from the Roberts farm (not a part of the trust estate) in her personal bank account in the South East National Bank, thus commingling the funds, that the trustee had cash assets of the trust in a safe deposit box in her own name which at the suggestion of the master the trustee deposited in a fiduciary account in the name of Elizabeth Perry, trustee, in the South East National Bank. The amount of the funds was $13,401.69. The master further found that prior to the filing of the complaint demands for an accounting had been made on the trustee by and on behalf of Benjamin Perry and Wilson James Perry, Jr.; that the trustee had made no accounting to the plaintiff or to any of the other beneficiaries; that the beneficiaries were entitled to an accounting; and that the decree should direct the trustee to make such an accounting. Objections to the master's report were permitted to stand as exceptions. A decree was entered on September 22, 1948, finding that plaintiff and the other beneficiaries of the trust were entitled to an accounting and directing the trustee to file

a verified account, including a schedule of trust assets, statement of receipts and disbursements in chronological order for the period from September 28, 1931, to the date of the filing of the accounts, and such other financial statements as she deemed necessary or appropriate. The decree found the interests of the beneficiaries in the trust, reserved jurisdiction on the question of taxing the costs and retained jurisdiction also for the purpose of receiving and disposing of the master's report and all issues raised thereby. The case was re-referred by this decree to the master in chancery for a hearing on the accounts and objections thereto.

The trustee filed her accounts for the period from September 28, 1931, to October 18, 1948. On November 8, 1948, the trustee filed a supplement to her account and subsequently a second supplement, bringing the accounts down to January 4, 1949. Plaintiff filed objections. Defendants, Lorinda and Eugene B. Perry, did likewise. Objections to the master's report on the accounting were filed by all parties not in default. The master overruled plaintiff's objections, those of Elizabeth Perry Hammerstrom and the guardian ad litem, and the separate objections of Eugene B. Perry and Lorinda Perry. He sustained some of the objections of the trustee, also adopted with certain exceptions objections by Eugene B. Perry and Lorinda Perry. The decree entered on July 1, 1949, overruled the exceptions to the master's report, adopted the master's findings; overruled the objections of Elizabeth Perry, trustee, in her

various capacities except that at the suggestion of plaintiff's attorney the fees of the trustee were allowed in the amount of $3,000 instead of $1,500 as the master recommended; reduced the master's fees and the fees of the guardian ad litem; held that the services of plaintiff's attorney had resulted in bringing into the estate a total of $27,404.32, and in the preservation of the funds so brought in and the preservation of other assets of the trust estate, and fixed the fee allowed to plaintiff for his attorney at $5,000; allowed plaintiff $370 to reimburse his attorney for costs and expenses; surcharged the accounts of the trustee as recommended by the master; did not make an allowance of fees to Ida P. Perry because no petition had been presented therefor; assessed the cost of the proceedings against the trustee individually; authorized the payment of the debts in the amount of $8,861.73 from the fund of the trust; fixed the fee of the court reporter at $382.25; found the interests of the parties and decreed that all of them were entitled to an immediate distribution of the trust estate; directed the trustee to proceed forthwith to distribute the assets of the trust after payment of the other amounts decreed; required that the trustee file a proposed plan of distribution and a settlement of her accounts within 30 days; and reserved jurisdiction to pass on this supplemental report, to enforce the terms of the decree and to instruct the trustee as to the division and distribution of the estate, particularly with reference to the interest of the defendant, Wilson James Perry, Jr.

Elizabeth Perry, in her various capacities, Lorinda Perry and Eugene B. Perry appeal from the order entered July 1, 1949, and from the decree of the same date, asking that various provisions therein be reversed and that the court give certain directions. Plaintiff, Benjamin Perry, filed a notice of cross-appeal. A cross-appeal was filed by the former guardian ad litem. In his brief he requests that we dismiss his cross-appeal, which is accordingly done. At the time the trust was created, September 28, 1931, the country was suffering under the great depression. Because of the settlor's advanced age it was found difficult to obtain a mortgage on her property. The trust was created to pay personal obligations of the settlor to members of her family, to clear all the encumbrances on the properties transferred to the trustee and then to distribute the assets of the trust to the beneficiaries. The real properties transferred to the trustee consisted of vacant lots in Chicago, Illinois, Porter County, Indiana, Ford County, Illinois, farm lands of about 316 acres in Ford and Iroquois Counties, Illinois, and irrigated farm lands of about 274 acres in Montana. Personal properties consisted of bonds in default at the time they were transferred to the trustee, which bonds were later exchanged for stock in a corporation, a claim against the heavily indebted estate of Samuel Wilson, deceased, a brother of the settlor, and the settlor's 1/4 interest in that estate consisting largely of farm properties. All properties transferred to the trust are still assets of the trust except two vacant lots in Chicago, which were

surrendered by the trustee because she did not have funds on hand to meet the obligations against them. The claim against the Wilson estate has been liquidated and a partial distribution has been made of that estate. At the inception of the trust the total obligations of the trust amounted to $32,812.15, consisting of encumbrances on real estate transferred to the trust in the amount of $26,725, of which $16,725 was on vacant lots, and of personal obligations of the settlor in the amount of $6,087.15. The income of the trust was derived almost entirely from the sale of produce of farm land transferred to the trust, which income was insufficient to meet current expenses and obligations of the trust for most of the years to 1944 without advances from some source. The trustee advanced a total of $2,477.85 in 1931, 1932, 1933, 1934 and 1936, and Josephine Perry, now deceased, advanced a total of $3,297.20 in 1932 and 1933, a total of $5,775.05 advanced by Josephine Perry and the trustee. In 1939 advances were obtained from the E. B. Perry estate.

On January 1, 1939, the indebtedness had been reduced to $26,317.38 by payment on principal and by forgiveness of debt arranged by the trustee. Under the terms of the trust agreement, as amended, the trust was to be distributed on February 12, 1939. On that date the trustee did not have on hand sufficient funds with which to pay the indebtedness of the trust, both principal and interest, to terminate the trust. The outstanding obligations of the trust on that date amounted to more than $26,317.38, which did not include

any amounts due to the trustee for compensation for her services as such. Under the trust agreement it was the duty of the trustee to pay off all indebtedness before making distribution. On June 24, 1946, there was on hand barely sufficient funds to pay the obligations of the trust for loans made to it. However, no fees had been paid to Elizabeth Perry for her services as trustee, which was an obligation of the trust. No funds had been received from the Montana properties since early in 1944. On April 25, 1945, Ida Perry wrote the trustee that on advice from her attorney she was not sending a check for the 1944 proceeds from Montana, a statement confirmed on September 17, 1945, by Ida P. Perry's attorney, Horace S. Davis, in a letter to the trustee, after repeated communications from the trustee to Ida P. Perry had gone unanswered. The agent (Ida P. Perry) also claimed to have made it impossible to sell the trust property in Montana by filing certain caveats against the properties.

The income of the trust was not sufficient throughout most of the time to pay the obligations of the trust. The personal accounts of Josephine Perry, to the date of her death on May 15, 1943, and thereafter of Elizabeth Perry, were used as convenience accounts for the collection of trust receipts of income and the disbursement of trust obligations. Trust receipts and trust disbursements were identifiable at all times. A duplicate deposit slip was made out for each deposit and stamped by the teller, which deposit slip showed the source of the funds deposited, the amount thereof, the drawer and drawee, date, the bank drawn upon and any other

relevant facts. The only duty of Josephine Perry with respect to the trust moneys deposited in her account was to issue checks thereon at the direction of the trustee, which she did. The trustee had in her possession at all times checks signed by Josephine Perry, payable to the order of the trustee, but otherwise blank. During the time these accounts were being used the trust owed money for advances made by Josephine and Elizabeth Perry to the trust. Certain expenses of Josephine Perry were paid from this account and the amount so paid was credited to the reduction of the money due from the trust to Josephine Perry. During the period when the trust funds were handled through the bank account of Elizabeth Perry, personal expenses paid by Elizabeth Perry from this account were credited to reduce the amount owed by the trust estate to Elizabeth Perry. The plaintiff had personal knowledge of these payments and of the fact that large sums of money were owed to Josephine and Elizabeth Perry in excess of the amount paid for these bills. No payments in the nature of advances from the trust fund were made to Lorinda Perry or Eugene B. Perry. There is no provision in the trust instrument requiring the distribution of income of the trust to the beneficiaries. The purpose of the trust was the payment of personal obligations of the settlor and the clearing of trust properties of encumbrances and the distribution of the assets. Consequently, the trust funds were not invested in interest bearing securities, but were accumulated to meet these obligations. The trustee did not sell the vacant lots in Chicago. The plaintiff had

investigated the value of these lots and made no objection to their retention. During the years 1939, 1940 and 1941, and again in 1943, when the trust was short of funds the trustee borrowed from the E. B. Perry estate. This money was paid back during the lifetime of Josephine Perry and after her death to Elizabeth Perry as agent for the E. B. Perry estate, in which the co-owners are interested in the same proportion as they are interested in the trust. Elizabeth Perry, as agent of the E. B. Perry estate, and as administratrix of the estate of Josephine Perry, has these funds on hand. They are not funds of the Elizabeth Perry trust.

Included in the property conveyed to the trustee were farm properties in Big Horn and Yellowstone Counties, Montana. From September 28, 1931, to the date of his death in August, 1933, Wilson James Perry, Sr., at that time a beneficiary of the trust and a brother of the trustee, acted as agent for the trustee in the management of the trust property in Montana. After his death Ida P. Perry, his widow, mother of Elizabeth Perry Hammerstrom and Wilson James Perry, Jr., acted as such agent. Both Wilson James Perry, Sr. and Ida P. Perry acted as agent for the trustee by mutual consent of the parties interested and without objection from anyone. For the years 1933 to 1947, both inclusive, sometime between January 1 and March 15, the agent sent to the trustee yearly statements of purported receipts and disbursements, supported by vouchers for disbursements but not by vouchers for receipts and without any

indication from whom income was received. These statements were used by the trustee for income tax purposes. From time to time funds were transferred to the trustee from Montana by the agent, but no funds have been received by the trustee from the agent for the years 1944 to 1948, both inclusive.

In 1945, in reply to the trustee's second request for the yearly statement for 1944, the agent wrote that having been served in a legal and binding manner in a partition suit instituted by plaintiff in Ford County Illinois, she was sending her statement to her attorney. The trustee was compelled to obtain information for her fiduciary income tax return over the long distance telephone. After two more letters from the trustee asking for vouchers and money, the agent replied that upon advice of her attorney she was not sending a check for about $2,500. No vouchers were enclosed. In May, 1945, Horace S. Davis, the agent's attorney, telephoned the trustee from an office in Chicago requesting information as to when the agent might expect an accounting, and was advised that the agent had no interest in the trust and was not entitled to an accounting. The trustee again wrote the agent for supporting papers for her 1944 statement. Mr. Davis, attorney for the agent, replied on September 17, 1945, transmitted the vouchers for disbursement but not for receipts of income, refused to send bank statements and cancelled checks, and said that pending an accounting the Montana funds would be retained until such order for their disposition as "our" court may make.

Subsequent yearly statements sent upon the trustee's request and for supporting documents and demands for trust funds were transmitted by the agent's attorney, together with vouchers for disbursements, but with no vouchers for receipts of income, and refusing to transmit trust funds.

In February, 1948, the trustee went to Billings and employed counsel. While there she inquired about the account at a bank and was advised by an official of the bank that there was such an account, but that the bank could not give her any information concerning it without the consent of the agent. After this trip to Montana, under date of March 29, 1948, Mr. Davis, in reply to a letter of plaintiff's attorney written at the suggestion of the chancellor, wrote that he would be glad to have the agent's accounts audited by "a competent and unbiased accountant." When the trustee was in Montana in April and May to consult with her attorney she learned for the first time through him, who had learned it from Mr. Davis, that arrangements were being made in Chicago to have a certified public accountant go over the agent's accounts. The trustee was not informed of these arrangements in Chicago until the pretrial conference on June 3, 1948, when it was learned that the agent was willing to have her accounts audited. Later, upon the suggestion of the court, the order was entered directing the trustee to go to Montana and authorizing her at her discretion to hire an accountant to assist her in preparing the account covering the Montana transactions. Because of the short period of time given for accomplishing the accounting, the

Perry, his guardian, and Wilson James Perry, Jr., in his own right. The caveats state that the trustee had not lived up to the trust agreement which provided for the education of Elizabeth Primrose Perry and Wilson James Perry, Jr.; that both had been willing, able and capable of receiving an education, but that the proceeds had not been used for that purpose; and further stated that the trustee no longer had power to convey or transfer the trust property. Mr. Davis, the agent's attorney, conceded in a letter that these instruments were of doubtful value under the Montana law, but he refused to cause the caveats to be removed although plaintiff's attorney had requested it. On June 14, 1949, plaintiff's attorney presented a petition for allowance for attorney's fees and costs. The matter was set for hearing on June 22, 1949. The chancellor announced he had received a letter from Mr. Davis, enclosing a check for $14,002.63, which he requested the chancellor to deposit with the clerk of the Circuit Court. The court entered an order directing the clerk to hold these funds in the registry of the court, subject to the further order of the court. The trustee's counsel called attention to the fact that the master's amended report recommended that if the agent sent this money to the clerk, an award of fees for her services as agent be made to her. The chancellor said that if she wanted fees, she had better file her petition. Plaintiff's attorney advised Mr. Davis of the ruling of the court and suggested the filing of a petition, stating that if it constituted a general appearance he would oppose any effort by the trustee

trustee wrote to her attorney in Billings asking to have all verifying documents "pulled" so as to be ready for her inspection. This attorney informed her that the books and records of the agent were being audited by the agent's own accountant and that the trustee would be unable to work on the agent's books. The trustee did not go to Montana to hire an accountant for the accounting. The trustee did not question the truthfulness and accuracy of the yearly statements of her agent until the latter's refusal since early in 1945 to furnish substantiating documents for receipts of income and the bank statements and cancelled checks of the account, and the alleged failure of the agent's accounts to tally with information received later. The trustee did not, therefore, include in her accounts an itemization of the receipts and disbursements for the Montana trust properties. She did, however, account for all funds transmitted to her from Montana, which amounted to $14,622.14.

During the hearings before the master on the trustee's accounts, plaintiff introduced in evidence, over objection, an audit report dated July 13, 1948, and an audit report dated December 9, 1948, prepared by Rowland, Thomas & Company, certified public accountants of Billings, Montana, for the agent. The trust deed provided that the interest of the beneficiaries of the trust was personal property and that they had no interest in the real estate. In July, 1945, Ida P. Perry caused to be filed in the Recorder's Office of Big Horn and Yellowstone Counties instruments known as caveats against the Hardin and Hesper farms, which were signed by Elizabeth Primrose Perry, now Elizabeth Perry Hammerstrom, Wilson James Perry, Jr., a minor, by Ida P.

to file a counterclaim. Mr. Davis replied that he was sure this would constitute a general appearance and that Mrs. Perry would therefore file no petition. The trustee asked that the funds in the registry of the court be paid over to her as trustee, which the court declined to do.

Appellants maintain that the court should have dismissed the complaint when it became known that it was powerless to render a decree binding and conclusive on one cestui of the trust. The appealing defendants filed a motion to dismiss the case on the ground that not all essential parties were properly before the court. Elizabeth Perry Hammerstrom and Wilson James Perry, Jr., nonresidents, had not been served personally with service, but had been served by publication and had not entered their appearance. The motion was denied but the point was again raised in the answer. Elizabeth Perry Hammerstrom afterwards entered her appearance. Wilson James Perry, Jr. appeared in the Circuit Court only by guardian ad litem. He reached his majority on May 18, 1949, before the entry of the decree on July 1, 1949. Appellants state that service by publication is not effective in a case of this character to cause the person so served to be bound by the decree, and that the trustee has no protection against another suit by Wilson James Perry, Jr., and that since the chancellor could not enter such a decree, the case should have been dismissed. Plaintiff insists that the court had jurisdiction of the defendant, Wilson James Perry, Jr., and that the orders entered are binding on him.

On May 11, 1950, John Potts Barnes, attorney for Elizabeth Perry Hammerstrom and Wilson James Perry, Jr., filed a motion in this court for leave to file their appearance herein and to adopt the brief filed by plaintiff. In a supporting affidavit Mr. Barnes states that he followed the proceedings in the instant appeal and that having examined the brief and argument for plaintiff, he is of the opinion that appearances ought to be entered herein for his clients and that they ought to adopt the brief filed herein by plaintiff. In countersuggestions appellants vigorously oppose allowance of the motion. It is unnecessary to discuss the authorities cited on this point in the respective briefs as the filing of the appearances obviates the objection presented by appellants. It will be noted that Sec. 74 of the Civil Practice Act provides that an appeal shall constitute a continuation of the proceeding in the court below. Wilson James Perry, Jr., having reached his majority, has offered to enter his appearance in this court and to adopt the briefs of plaintiff. It is our view that this request, when assented to by this court, constitutes a general appearance for all purposes. Certainly, after such a motion deliberately made, he would be estopped to assert that he had not entered a general appearance. The motion, taken with the case, by Elizabeth Perry Hammerstrom and Wilson James Perry, Jr., to enter their appearances and to adopt the brief filed herein by plaintiff, is allowed.

Appellants maintain that the trustee was not accountable for the acts of her agent in Montana and was excused from making an accounting with reference to the Montana properties except as to funds actually received by her from that source, and that plaintiff should be precluded from having an accounting because he did not come into equity with clean hands. Citing Woodridge v. Bockes, 170 N. Y. 596, appellants point out that the right to an accounting is not an absolute right, that it is one which should be accorded upon principles of equity alone, and that it will not be ordered if the circumstances are such as to make an accounting unnecessary or improper. See also Patterson v. Northern Trust Co., 170 Ill. App. 501. In the trial court defendant resisted plaintiff's right to an accounting. An objection covering this point was allowed to stand as one of the exceptions which the chancellor overruled. The decree adjudged that plaintiff was entitled to an accounting and defendant was directed to file her account. In our opinion the decree entered September 22, 1948, was a final appealable decree. See Rettig v. Zander, 364 Ill. 112; Altschuler v. Altschuler, 399 Ill. 559. Defendant did not appeal. The trustee complied with the terms of the decree and filed her account. It is our view that the matters adjudicated in the decree entered December 22, 1948, are res judicata and cannot be urged on this appeal.

Appellants assert that the so-called audits from Montana were inadmissible in evidence, except in so far as they are admissions against interest by the agent. Plaintiff

replies that they are admissible, having been prepared at the direction of the trustee's agent. The relationship between the trustee and the agent presents an anomalous situation. As principal, the trustee had the power to discharge Ida Perry as her agent, but she has not done so and Ida Perry is still acting as agent for the trustee. While it is elementary law that an agent acting within the scope of her authority binds her principal, in view of the antagonism between the principal and the agent in this case, we are of the opinion that the audits from Montana were inadmissible as evidence, except as admissions against interest by the agent. The agent declined to enter a general appearance in the Circuit Court. The agent should enter a general appearance in the instant case so that a proper accounting may be obtained as to her agency of the Montana properties. It is our view that the expenses of obtaining an accounting from the agent should be borne by the estate or by the agent. If the agent refuses to file a general appearance in the case at bar, the trustee should, at the expense of the estate, bring a suitable action in Montana. If the agent and her two children refuse to remove the cloud on the Montana property, caused by the recording of the caveats, the trustee should file a proper action in that state for the purpose of removing the cloud. Should Ida P. Perry enter a general appearance in the instant case, the chancellor will have the right to allow her compensation for her services as agent.

Appellants assert that the funds transmitted by the agent to the chancellor should have been turned over to the trustee. The $14,002.63 admitted by the agent to be trust funds in her possession as of December 9, 1948, sent by the agent's attorney to the chancellor and deposited with the clerk, should be turned over to the trustee as their proper custodian. The record shows that the trustee has been honorable in her dealings. The decree should be modified so as to provide that these funds shall be turned over to the trustee. Appellants say that distribution should not be ordered until the purposes of the trust have been entirely accomplished, and a full, complete and substantial accounting has been had of the Montana assets. They point out that the properties of the trust cannot be cleared, as the terms of the trust require, until the caveats on the Montana farms are removed and that an accounting must be had from the Montana agent. We agree with these views. The expense of procuring an accounting from the Montana agent and of removing the caveats are a proper trust expense.

Appellants also state that the fees of the trustee are grossly inadequate and should be increased by the amount requested. The master recommended an allowance of $1,500, which the chancellor raised to $3,000. The trustee asked for $10,000. She testified that the Samuel Wilson trust, in which the trust involved in the instant case had an interest, had similar but less difficult problems and the trustee therein received $7,600 in fees for services over the same span. The parties are in agreement that the question

with reference to the fees of the trustees is "What is a reasonable fee for over 18 years' service as a trustee?" We have carefully read the testimony and exhibits bearing on the activities of the trustee. It would serve no useful purpose to go into detail as to the duties she performed. Plaintiff argues that the fees allowed to her are adequate. We find that under the circumstances the fees allowed to the trustee are inadequate and that she should be allowed $6,000.

We turn to a consideration of the contention of appellants that the surcharges against the trustee, with one possible exception, should not have been made. It is not claimed that the surcharges totaling $2,236.77 were made because of any wrongdoing on the part of the trustee. The trustee was surcharged with interest on trust indebtedness accrued after July 1, 1946. These interest charges in the amount of $819.76 were based upon the contention of plaintiff that after June 24, 1946, the trustee had on hand sufficient funds to have paid in full all indebtedness of the trust estate and so stop the accrual of interest. On that date the total indebtedness of the trust for mortgage and advances made to the trust was less than the amount of the funds on hand, but the margin was very slim. During the period of the trust to the hearings on fees of the trustee before the master on February 10, 1949, no fees had been paid to her for her services as trustee, although the trust deed directed that she be paid compensation. Her right to fees was determined in her favor by the master and the chancellor. No funds had been received from the Montana property since early

in 1944. The filing of the caveats against these properties would necessitate litigation to clear the title, unless voluntarily removed. We are of the opinion that the trustee should not have been surcharged for interest in the amount of $819.76. The trustee was surcharged $30 for subscriptions to the Daily Law Bulletin, $461.30 for court reporter's charges and $150 for attorney's fees. The trust deed provides that in case the trustee should be made a party to any litigation in connection with the trust property, she should have a lien on the trust property for all her costs, charges and expenses of such litigation, including reasonable attorney's fees, and should be reimbursed out of the trust property. The trust deed provides for the payment of such fees out of the trust. Plaintiff's objection that there is no proof either of services or the value thereof comes too late, as it was not advanced in the trial court. We find that the trustee should not have been surcharged for these items, which are properly chargeable to the trust estate. The trustee was charged with $775.71 because she failed to deduct from her income tax returns for the years 1937 and 1942 to 1947, both inclusive, payments of interest to herself and to Josephine Perry, on the theory that had such deductions been taken, the savings in income would have amounted to $775.71. The master found that the trustee did not discharge the burden of showing some reasonable excuse for her failure to claim deductions for these interest payments. The trustee concedes that she made this error, but states it was excusable. We find that the chancellor was right in allowing this surcharge.

Defendants argue that plaintiff was not entitled to attorney's fees to be paid out of the trust. The parties are in agreement that there is no statute authorizing fees for his attorney and that these fees cannot be assessed as court costs. Defendants say that this is a spendthrift trust and that plaintiff cannot assign his interest or the interest of others. There is no assignment. Defendants also argue that plaintiff's agreement with his attorney was champertous and void as against public policy. Plaintiff seeks to recover fees for his attorney from the trust estate. The record does not show that the attorney for plaintiff ever agreed to pay the costs of the suit. Payments were made during the course of the litigation for the convenience of the plaintiff and were to be reimbursed. The original costs were all paid by the plaintiff. Plaintiff's claim for attorney's fees consistently has been that he is entitled to an allowance of attorney's fees because he has brought funds into a common fund and has preserved this fund to its proper use. The trust estate is a common fund in which six parties are interested, namely, Benjamin Perry, as to an undivided one fifth interest; Elizabeth Perry, as to an undivided one fifth interest; Lorinda Perry, as to an undivided one fifth interest; Eugene B. Perry, as to an undivided one fifth interest; Elizabeth Perry Hammerstron, as to an undivided one tenth interest; and Wilson James Perry, Jr., as to an undivided one tenth interest. Plaintiff has recovered funds and added them to this common fund. Before the complaint was filed by plaintiff certain cash

assets of the trust were in a safe deposit box rented in the name of Elizabeth Perry. Through the efforts of plaintiff $13,401.09 was deposited in the South East National Bank in the name of the trustee. Plaintiff also in this proceeding procured the transfer of $14,002.63 from the agent to the registry of the Circuit Court. We are satisfied that plaintiff is entitled to reasonable fees for the services of his attorney on the common fund theory. First National Bank v. LaSalle Wacker Building Corp., 280 Ill. App. 188.

Defendants maintain that the fees allowed were excessive; that the allowance of fees included compensation for services of benefit only to plaintiff, if to anybody; that since the allowance of plaintiff's attorney's fees was in a lump sum, this court cannot tell what part of the fees was allowed for noncompensable services; and that the decree as to attorney's fees should be reversed. Plaintiff asked $8,000 as attorney's fees for his attorney. The chancellor fixed these fees at $5,000. We are of the opinion that this is a reasonable fee. Defendants assert that the fees of the guardian ad litem should not have been allowed without evidence and in any event were excessive. The court allowed the guardian ad litem fees of $1,750. The guardian was entitled to a reasonable sum for his services as such guardian, to be fixed by the court. We cannot say that the amount allowed by the chancellor was unreasonable or excessive. We cannot agree with defendants that the guardian ad litem did not properly represent the minor. Defendants also state that no fees could be allowed to the master on the certificate or amended certificate filed by him for services for

which there are no statutory fees, because they are not properly itemized and include items not compensable. We find that the itemization of the master in his amended certificate fulfills the requirements of the law. The chancellor did not err in the allowance made to the master.

Defendants argue that the costs of this proceeding should not be assessed against the trustee individually; that judgment as at common law should not have been entered against the trustee; and that execution should not have been issued thereon for costs and fees not assessed to the trustee personally. The costs assessed against the trustee in her individual capacity are the master's fees amounting to $1,165.75, the taxable costs amounting to $18.60, and the court reporter's fees of $382.25. The trust deed provides for the payment of these costs out of the trust funds. We find that the costs should not be assessed against the trustee individually and that they should be paid out of the trust assets. The decree provided that judgment as at common law should be entered against Elizabeth Perry individually for $1,750 in favor of the guardian ad litem, and for $5,370 in favor of plaintiff for his attorney's fees and expenses. It was provided that if Elizabeth Perry paid these judgments, she should be entitled to reimbursement from the trust estate, chargeable to the interests of the beneficiaries in proportion to their interests. These charges were not decreed to be chargeable to Elizabeth Perry personally. Judgment as at common law should not have been entered against Elizabeth Perry individually for the fees of the guardian ad litem and the amount allowed to plaintiff for his attorney's fees and expenses.

Plaintiff, as cross-appellant, urges that defendant should be charged for failure to dispose of speculative investments. Two of the vacant lots, known as the Brower lots and against which there was a mortgage indebtedness and other charges of over $2,000, were surrendered to the mortgagee for the payment of $150. The purpose of the trust was to pay debts, clear the property and then distribute it. The settlor considered the lots a good investment. The master found that in view of their admitted speculative nature, the trustee was in the proper exercise of her duties as trustee in disposing of the lots and thereby minimizing the loss to the trust estate. She has retained all of the vacant lots except the Brower lots. The Brower lots were surrendered for the reason that at the time there was no cash to carry them. In our opinion the trustee exercised a reasonable discretion under the trust instruments in keeping title to the vacant lots other than the Brower lots, and the chancellor was right in so holding.

For the reasons stated the order of the Circuit Court of Cook County of June 28, 1949, and the decree of the Circuit Court of Cook County entered July 1, 1949, are reversed, and the cause is remanded with directions to proceed in a manner not inconsistent with the views expressed. The costs in the Circuit Court and in this court are taxed against Elizabeth Perry, as trustee, under the trust agreement of September 28, 1931, as amended on February 12, 1934.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.

38

45276

JOSEPH LENDRAITIS and RUTA TOLPEZNIKIENE - KASPARAITYTE of The Republic of Lithuania, Appellees,	)	APPEAL FROM
v.	)	CIRCUIT COURT
JOSEPH GAVENE, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On December 6, 1946, the Probate Court of Cook County, on petition of Joseph Gavene, appointed him administrator of the estate of John Lendraitis, alias Jonas Landraitis, deceased. On the testimony of the administrator as to the heirship, the court, on December 10, 1946, entered an order declaring decedent's only heirs at law to be: (1) Joseph Gavene, the administrator, and George Gavene, his paternal first cousins, and (2) Unknown heir or heirs at law on the maternal side. Subsequently, the court vacated the table of heirship theretofore entered and found and declared that the decedent died leaving him surviving: (1) Joseph Lendraitis, his brother; (2) Ruta Tolpeznikiene, wife of Michael Topezninkas, child and heir at law of Anna Kasperitis, who was a sister of decedent and who died before decedent, as the only heirs at law and next of kin.

On September 8, 1947, a petition was filed in the Probate Court asserting that the proof of heirship was erroneous and that decedent left him surviving Joseph Lendraitis, his brother and Ruta Tolpeznikiene, his niece, as his only heirs at law and next of kin. On September 9, 1947, the

administrator presented and had approved the administrator's final report and account showing receipts of $11,641.63, various disbursements and distribution to the administrator of $3,625.39 and a like amount to his brother George, as the only heirs of decedent.

Thereafter the brother and niece of decedent, by the Counsul General of the Republic of Lithuania, their attorney in fact, filed a petition in the Probate Court showing that they were the only heirs at law and next of kin of decedent and asked that the order approving the final account and report be vacated. The administrator questioned the authority of the Lithuanian Consul to act in the premises. At the suggestion of the probate judge the State Department was asked for the position of our Government with respect to the situation. Thereupon a statement was obtained and filed to the effect that our Government recognized the Lithuanian Republic and its Consul. Before the date set for the hearing on the motion to vacate the original proof of heirship and the approval of the final account and report, without notice to the interested parties and without informing the court as to the facts, the administrator on May 17, 1948, induced the court to enter an order finding that the administrator voluntarily came before the court requesting that the estate be reopened for the purpose of amending the heirship and that he be given 90 days in which to file an amended final report and account, and ordered that the estate be reopened for the purpose of amending the heirship and that the administrator file his amended report and account within 90 days.

Upon discovery of the irregular conduct on the part of the administrator, the rightful heirs filed a petition informing the court of the facts. After a full hearing the court, on May 20, 1948, entered an order finding that the allegations of the petition were true; that decedent left him surviving as his only heirs at law his brother and niece; that the administrator wrongfully and in violation of the order of the court theretofore entered, filed his final account and report and had it approved; and that the administrator wrongfully closed the estate prior to the disposition of certain issues of heirship pending. The court decreed that the order approving the final account and report of the administrator and closing the estate be set aside and that the administrator file a current account within 40 days.

The administrator appealed to the Circuit Court from the order of May 20, 1948. This appeal was dismissed on November 28, 1948, on the ground that it was not a final order. One year after the entry of the order requiring the administrator to file an account within 40 days, he had not complied with the order. On May 19, 1949, the Probate Court entered an order removing him for cause. This order recites that the cause came on to be heard upon the petition for the removal of the administrator and his answer thereto, and upon citation issued on the court's own motion and upon notice to respondent and his attorney, and the court having heard argument of counsel and being fully advised in the premises, finds that because of the conduct of the administrator he

485

45276

JOSEPH LENDRAITIS and RUTA TOLPEZNIKIENE-KASPARAITYTE Of The Republic of Lithuania, Appellees,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.
v.	)	
JOSEPH GAVENE, Appellant.	)	

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On December 6, 1946, the Probate Court of Cook County, on petition of Joseph Gavene, appointed him administrator of the estate of John Lendraitis, alias Jonas Landraitis, deceased. On the testimony of the administrator as to the heirship, the court, on December 10, 1946, entered an order declaring decedent's only heirs at law to be: (1) Joseph Gavene, the administrator, and George Gavene, his paternal first cousins, and (2) Unknown heir or heirs at law on the maternal side. Subsequently, on motion of the administrator, the court vacated the table of heirship theretofore entered and on the testimony of the administrator found and declared that the decedent died leaving him surviving: (1) Joseph Lendraitis, his brother; (2) Ruta Topezninkiene, wife of Michael Topezninkas, child and heir at law of Anna Kasperitis, who was a sister of decedent and who died before decedent, as the only heirs at law and next of kin.

On September 8, 1947, a petition was filed in the Probate Court asserting that the proof of heirship was erroneous and that decedent left him surviving Joseph Lendraitis,

his brother and Ruta Tolpeznikiene, his niece, as his only heirs at law and next of kin. Without waiting for a determination of the question and on the next day, September 9, 1947, the administrator and his attorney presented and had approved the administrator's final report and account showing receipts of $11,641.63, various disbursements and distribution to the administrator of $3,625.39 and a like amount to his brother George, as the only heirs of decedent.

Shortly thereafter the brother and niece of decedent, by the Counsul General of the Republic of Lithuania, their attorney in fact, filed a petition in the Probate Court showing that they were the only heirs at law and next of kin of decedent and asked that the order approving the final account and report be vacated. The administrator questioned the authority of the Lithuanian Consul to act in the premises. At the suggestion of the probate judge the State Department was asked for the position of our Government with respect to the situation. Thereupon a statement was obtained and filed to the effect that our Government recognized the Lithuanian Republic and its Consul. Before the date set for the hearing on the motion to vacate the original proof of heirship and the approval of the final account and report, without notice to the interested parties and without informing the court as to the facts, the administrator on May 17, 1948, induced the court to enter an order finding that the administrator voluntarily came before the court requesting that the estate be reopened for the purpose of amending the heirship and that he be given 90 days in which to file an

amended final report and account, and ordered that the estate be reopened for the purpose of amending the heirship and that the administrator file his amended report and account within 90 days.

Upon discovery of the irregular conduct on the part of the administrator, the rightful heirs filed a petition informing the court of the facts. After a full hearing the court, on May 20, 1948, entered an order finding that the allegations of the petition were true; that decedent left him surviving as his only heirs at law his brother and niece; that the administrator wrongfully and in violation of the order of the court theretofore entered, filed his final account and report and had it approved without apprizing the court of the "full facts"; and that the administrator wrongfully closed the estate prior to the disposition of certain issues of heirship pending. The court decreed that the order approving the final account and report of the administrator and closing the estate be set aside and that the administrator file a current account within 40 days.

The administrator appealed to the Circuit Court from the order of May 20, 1948. This appeal was dismissed on November 28, 1948, on the ground that it was not a final order. One year after the entry of the order requiring the administrator to file an account within 40 days, he had not complied with the order. On May 19, 1949, the Probate Court entered an order removing him for cause. This order recites that the cause came on to be heard upon the petition for the removal of the administrator and his answer thereto, and upon citation issued on the court's own motion and upon notice to respondent and his attorney, and the court having heard argument of counsel and being fully advised in the premises, finds that because of the conduct of the administrator he

is an unfit person to act as administrator; that he mismanaged the estate; that he "is conducting himself in such a manner as to endanger the sureties on his bond"; and that he failed to file an accounting within the time prescribed by the court. The court decreed that the letters of administration theretofore issued to Joseph Gavene be revoked; that he be removed as administrator; that he file an account within 21 days; and that he turn all of the assets of the estate over to Seymour Price, appointed administrator de bonis non of the estate. The administrator perfected an appeal to the Circuit Court. That court, after hearing the evidence and argument of counsel, on February 21, 1950, entered an order "removing Joseph Gavene as administrator." On April 4, 1950, the court denied Joseph Gavene's motion to vacate the order of February 21, 1950. He appeals, and prays that the orders of February 21, 1950, and April 4, 1950, be reversed, and that the cause be remanded with directions to enter an order restoring him as administrator.

Appellant maintains that the orders removing him as administrator are erroneous because the petition on which they are based does not ask for removal. He says the petition merely prays that an order for citation issue directing him to show cause why he should not be removed and that he be directed to file his final account. He relies on Sec. 278 of the Probate Act, (Par. 432, Ch. 3, Ill. Rev. Stat. 1949) that before removing an administrator for any of the causes set forth in Secs. 276 and 277 of the Act, the court shall order a citation to issue directing the respondent to show cause why he should not be removed for the cause stated

therein. He cites In Re Graney's Will, 245 Ill. App. 407; Hanifan v. Needles, 108 Ill. 403; Wackerle v. People, 168 Ill. 250; Munroe v. People, 102 Ill. 406; and Horn v. White, 127 Ill. App. 222, in support of his argument. Sec. 276 of the Probate Act provides that on the verified petition of any interested person or upon the court's own motion the Probate Court may remove an administrator when he wastes or mismanages the estate or when he fails to file an accounting within the time prescribed by the court. In the Circuit Court it was admitted that the administrator failed to file an accounting within the time prescribed by the court. The evidence supports the finding of the Probate Court that the administrator wrongfully and in violation of the order of the court filed his final accounting and report and had it approved without informing the court as to the facts, and that he wrongfully closed the estate prior to the disposition of the issue of heirship pending before the court. The record shows that the administrator failed to account when ordered by the court and also was guilty of mismanagement.

Appellant also urges that since petitioners "never obtained an order for citation as prayed for in their petition, there was no authority for the issuance of the pretended citation, and neither the Circuit Court nor the Probate Court acquired jurisdiction of the person of respondent," citing Sec. 278 of the Probate Act, (Par. 432, Ch. 3, Ill. Rev. Stat. 1949.) He asserts further that petitioners did not prove that a citation was issued directing him to show cause why he should not be removed and that the pretended

citation "was never served or returned to the Probate Clerk with an endorsement of service or nonservice as required by law"; that the attempted service of notice by mail on respondent was ineffectual to confer jurisdiction because neither the petitioners nor their attorney ever filed the requisite statutory affidavit of nonresidence as required by Sec. 279 of the Probate Act; and that the attempted service of notice by mail did not give the Circuit or Probate Court jurisdiction of him "because the alleged receipt attached to the proof of service, purporting to bear the name of respondent written by some person purporting to be his agent, is dated May 4, 1949, whereas the notice and proof of service were filed with the Probate Court May 2, 1949." He states that if the court had jurisdiction, its order of removal is void because he was not granted a hearing either in the Circuit Court or the Probate Court, and that "if the court had jurisdiction, its removal order is void because the pertinent allegations of the petition were not proved." In the trial court appellant did not question the validity of the citation to remove him. He is doing so for the first time in this court. We review the case presented to the trial court and do not sit to try issues presented here for the first time. (Waller v. Hildebrecht, 295 Ill. 116, 121.) In the Probate and Circuit Courts he maintained that he had done everything asked of him by the court. At this time he is not in a position to urge the question of procedure on which he relies.

We are of the opinion that appellant was properly removed as administrator on the court's own motion, pursuant to Sec. 276 (c) and (g), and Sec. 279 of the Probate Act, (Pars. 430 and 433, Ch. 3, Ill. Rev. Stat. 1949) which provides for the removal of an administrator either on the verified petition of any interested person or upon the court's own motion. We are satisfied that the Probate and Circuit Courts followed the procedure outlined by the statute and that appellant had his day in court. Our view is that he had a full and fair hearing in the Probate and Circuit Courts and that no reversible error was committed. Therefore, the orders of the Circuit Court of Cook County are affirmed.

ORDERS AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.

486

45402

MARY O'BRIEN, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT
RAYMOND L. O'BRIEN, Appellee.	)	COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a contempt proceeding arising out of a dispute over the custody of two minor children of divorced parents. Plaintiff-respondent, who lived in California with the children, was found guilty of contempt in failing to comply with custody provisions of the decree. She was fined $100 per day, commencing October 9, 1950, for each day the children or either of them were out of this jurisdiction. Respondent has appealed.

The parties were divorced at respondent's suit January 8, 1947. Defendant-petitioner consented to have the divorce case heard as a default matter. Respondent was given custody of the children. Petitioner was ordered to pay $25 weekly support for the children. Respondent was authorized to establish a home in California for the children on the condition that she bring the children to Chicago for petitioner's custody six weeks each year "during the summer months". Respondent was to bear the expenses of transportation and maintenance of the children while traveling to and from Chicago. This decretal condition was fulfilled in 1947, 1948 and 1949.

July 18, 1949, respondent petitioned the court for a modification of the decree to provide for substantial increase of the support payments because of the burden of the expense of complying with the decree and prayed for general relief. Petitioner answered that there was no change of circumstances justifying an increase and claimed that respondent incurred needless expense in fulfilling the decretal condition. November 30th, on respondent's motion, a hearing was set for January 10, 1950. That day petitioner filed a petition questioning the jurisdiction of the court in granting leave to respondent to take the children to California; charging her with violating the spirit of the decretal condition and with alienating the affections of the children from petitioner; seeking, in the alternative, orders directing that the children be returned to the jurisdicition or custody be given him; and praying for attorney's fees and costs to be paid by respondent from her more abundant means.

On petitioner's motion, a hearing on his petition was set for March 7th without further notice. On the latter day, by agreement, the hearing on "pending petitions" was continued to April 14th. The next order in the record is of May 25th which recites that on respondent's motion, with petitioner "concurring", the hearing was continued generally, subject to being called up on five days notice.

The next pleading in the record is a petition filed by petitioner August 23rd. It alleged that respondent failed to fulfill the decretal condition for the summer of 1950. The prayer was for a modification of the decree, transferring custody to the petitioners; for an order relieving

petitioner of the weekly support payments; that respondent be fined $100 per day for each day she retained custody; and for an allowance for petitioner's solicitors. The order entered the same day, pursuant to the petition, recited due notice to respondent. It relieved petitioner of the obligation of making the weekly support payments, ordered respondent to answer and set a hearing for September 11, 1950, without further notice. August 25th, on respondent's motion, the time for pleading was extended to September 18th and the hearing set for that day. September 7th respondent filed a motion to strike the petition of August 23rd on the ground, among others, that the subject matter of the petition was involved in the pending petitions and that counsel for respondent had "actively endeavored" unsuccessfully to secure a hearing.

The hearing was had September 18th and 19th. It consisted mainly of colloquy between court and counsel. Respondent's counsel called petitioner under Sec. 60 of the Practice Act, seeking to show a change of financial circumstances. Counsel also offered a deposition of respondent, taken in the fall of 1949, to show the burden of fulfilling the decretal condition. The court declined to consider this testimony on the ground that the primary issue was the failure of respondent to fulfill the decretal condition in 1950. September 25th an order was entered denying the prayer in respondent's petition of July 18, 1949, overruling the motion to strike the petition of August 23rd, finding that respondent had not shown good cause for failure to bring the children to petitioner in the summer of 1950, finding that this

failure was a wilful refusal, finding her guilty of contempt, ordering her to return the children to this jurisdiction on or before October 9, 1950, and, upon her failure to do so, imposing a fine of $100 per day thereafter. The order granted respondent the "privilege" of purging herself of contempt by producing the children before the court on or before October 9, 1950, for two weeks custody by petitioner. October 9th an order was entered finding respondent had failed to purge herself according to the "privilege" and assessing the fine of $100 per day.

The respondent has appealed from the orders of August 23rd, September 25th and October 9th, 1950.

We see no merit in the contention that the August 23rd order, relieving petitioner of the obligation to make the weekly payments, was erroneous because the court did not proceed according to Superior Court Rule 60 (6). This rule requires, when modification of a decree concerning custody is sought, a rule on respondent to plead and service of a copy of the rule and petition. There was due notice to respondent. The record makes no showing that she was represented at presentation of the petition and, we presume, made no demand for compliance with the rule. It sufficiently appeared from the verified petition that respondent had not complied, and did not intend to comply, with the decretal condition. She was in no position to complain of the suspension of the payments. We think that the court did not abuse its discretion under the circumstances.

The same considerations dispose of respondent's complaint that the orders of August 23rd, September 25th and October 9th were void for failure of the chancellor to comply with Superior Court rule 18 (1)(b). This rule requires delivery of a certified copy of a rule to the party bound to obey the same, where failure to obey the rule would result in contempt proceedings. No complaint was made by respondent that the rule had not been complied with. Her motion to strike the petition of August 23rd was overruled and her counsel proceeded to hearing on two separate days without complaining and without asking time to answer. The orders of September 25th and October 9th were entered pursuant to the hearing and with no objection that respondent had not been served with a copy of the rule or that she had been prejudiced in any way. Because of the seriousness of a contempt proceeding, rule 18 (1)(b) should not be disregarded. In this case, however, we are sure that failure to follow the rule was of no moment to respondent.

We see no merit in respondent's contention that she was not before the court in such a way as to be subject to the contempt order. The case of People v. Graber, 397 Ill. 522, relied on by respondent, involved the attempted compulsion of a nonresident to give a deposition. Respondent here had sought the jurisdiction of the court in an attempt to modify the decretal provisions. Her motion to strike the August 23rd petition asserted that the subject matter of that petition was involved in the pending petitions upon which she had been "endeavoring" to obtain a hearing.

This is civil contempt because the main purpose of the proceeding was the advancement of petitioner's remedy, seeking his decretal right of custody, and only incidentally vindicating the authority of the court. Porter v. Alexenburg, 396 Ill. 57. We are not therefore confined to the terms of the contempt order to find its justification. There is no finding of respondent's ability to fulfill the decretal condition. There was no necessity for the finding because the decree implies respondent's ability to perform and the decree stands. Respondent's difficulty here, as elsewhere, is that she has disregarded the decree because her petition to modify the decree had not been heard. We think we should say that the orders for continuances in the record before us do not bear out respondent's contentions that she persistently and unsuccessfully sought a hearing.

The decretal condition required respondent to bring the children to Chicago at her expense for six weeks during the summer for custody of petitioner. Respondent took the risk of being in contempt when she relied upon her pending petition to excuse her from fulfilling the decretal condition. We think the chancellor was justified in finding her guilty of contempt of court.

The Chancery Act (Chap. 22, Sec. 42, Ill. Rev. Stat.) authorizes the imposition of a fine in the enforcement of a decree. If the fine imposed is upheld, a total of more than $20,000 would be payable at this time by respondent to the county for school purposes (Porter v. Alexenburg, 396 Ill. 57) since no one is named in the order to receive the payments. It is manifest to us that this sum has no

reasonable relation to respondent's contemptuous conduct, to any showing of her financial condition in the record, or to petitioner's injury. We see no way to measure the latter's injury in terms of money.

It is admitted the respondent is a fit mother, that she has furnished the children a good home in California, and that the children were in school in October 1950. The contempt was in respondent's conduct in the summer which ended September 23, 1950. (World Almanac, New York: New York World-Telegram, 1950.) It was not in failing to produce the children in court October 9th. There was no decretal requirement that respondent bring the children at her expense for two weeks in October for petitioner's custody. The fine imposed, however, was to begin on October 9th. If respondent brought the children into court October 11th, the fine would have been $100. This amount would clearly be inadequate to punish respondent's contempt. The other extreme is the accumulated sum which we have already mentioned as unreasonable. The chancellor had the obligation of enforcing the decretal provision. Respondent had spurned the obligation which she assumed as a condition of her right to take the children from this jurisdiction. Her conduct has been gravely offensive. The chancellor no doubt prudently contemplated that unless the gravity of her offense was made plain, the summer of 1951 might bring a repetition of respondent's contemptuous conduct.

We do not decide in this opinion that the mode of fine imposed by the chancellor is not lawful. We think that under the circumstances of this case a definitive fine of a sum certain should be imposed. The amount of the fine should have a reasonable relation to the gravity of the offense, to the evidence of the ability of respondent to pay, and to the assurance of future enforcement of the decree. The chancellor has continuing jurisdiction to deal more severely with future contempt should respondent persist in disregarding the orderly processes of the courts of this state.

The fine imposed in the order of October 9th was unreasonable and an abuse of discretion.

For the reasons given the order of August 23, 1950, is affirmed and the order of September 25, 1950, insofar as it ordered the return of the children in October and conditionally imposed the fine, and the order of October 9, 1950, are reversed and the cause is remanded with directions to enter a contempt order consistent with the views expressed hereinabove.

AFFIRMED IN PART; REVERSED IN PART AND CAUSE REMANDED WITH DIRECTIONS.

BURKE, P.J. AND LEWE, J. CONCUR.

487

A

45296

343 I.A. 646

EDWARD V. TRAINOR, Appellant, v. THE TRUST COMPANY OF CHICAGO, as Liquidation Trustee under Trust No. 995, known as 7000 South Shore Drive Liquidation Trust, HERBERT HILLEBRECHT, WILLA HILLEBRECHT, and HENRY W. HILLEBRECHT, Appellees.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

November 6, 1935, pursuant to a reorganization plan approved in a proceeding instituted under Section 77-B of the Bankruptcy Act (11. U. S. C. A., Sec. 207), a liquidation trust agreement was executed, naming The Trust Company of Chicago as liquidation trustee and Herbert Hillebrecht, Walter A. Wade, and James V. Bremner as Trust Managers. The trust property consists of a sixteen-story apartment building located at 7000 South Shore Drive in the City of Chicago, Cook County, Illinois. Plaintiff, owner of 537 trust units issued in accordance with the terms of the trust agreement, filed a complaint asking for construction of the trust agreement and for a finding that plaintiff and other holders of trust units will become equitable owners of the trust property on July 1, 1950, entitled to partition thereof, or sale if the premises are not susceptible of partition. The complaint also prayed for appointment of a successor trustee and an order restraining the trustee from taking any steps under the trust agreement to form a corporation and conveying the trust property to such corporation.

Defendants answered and filed a counterclaim. By agreement of the parties the cause was heard by the court upon the pleadings. The court found the equities were with the counter-claimants; dismissed plaintiff's cause of action for want of equity, and denied his motion for a restraining order. The decree ordered that the liquidation trustee organize and form an Illinois corporation under the provisions of the trust agreement and that the court retain jurisdiction to supervise the organization of said corporation, distribution of the stock, and attorney's fees to be allowed.

Plaintiff appealed to the Appellate Court for the First District, where the cause was transferred to the Supreme Court. The Supreme Court transferred the cause to this court on the ground that no freehold was involved. (Trainor v. The Trust Company of Chicago, 408 Ill. 296.)

The gist of the complaint is that the trust managers, in violation of their trust, acquired certain trust units; that the trust managers and the liquidation trustee made no bona fide attempt to sell and liquidate the trust assets and distribute the proceeds to the beneficiaries within the period fixed by the trust agreement; and that the provision of the trust agreement providing for the formation of a corporation upon the termination of the trust was not intended as a substitute for the liquidation of the trust property.

The pertinent sections of the trust agreement appear in Article X, and read:

"Section 1. This trust may be terminated at such time as Trust Managers in their sole discretion may determine, it being the intention, however, that the Trust Property be sold and liquidated in accordance with the purposes of this trust hereinbefore stated, but in all events this trust shall be terminated on July 1, 1950.

"Section 2. Upon termination of this Trust, Liquidation Trustee shall promptly apply so much of the Trust Property or the income, avails and proceeds thereof as is necessary thereto the payment of all costs and expenses of administration or disposition of the Trust Property and to the payment and discharge of all liabilities, indebtedness, claims, liens and charges of or against the trust estate or Trust Property. Thereupon Liquidation Trustee shall distribute the net Trust Property or the proceeds and avails thereof to and among the holders of outstanding Participation Certificates in proportion among them as the Trust Units evidenced by the Participation Certificates respectively standing in their names bear to the total Trust Units then issued and outstanding.

"Section 3. If, on termination of the trust prior to July 1, 1950, Trust Property or any part thereof is, in the sole opinion of Trust Managers, not susceptible of distribution in kind or if, in the sole opinion of Trust Managers, it is advisable to dispose of all or a substantial part of Trust Property in its entirety, Trust Managers shall advise Liquidation Trustee accordingly and shall direct that the Trust Property or part thereof in question be offered

for sale or other disposition as in such direction stated. Thereupon Liquidation Trustee shall offer the same for sale upon twenty (20) days' notice in writing to the holders of outstanding Participation Certificates, which notice shall specify in summary form the Trust Property or part thereof to be offered for sale and the date, hour and place when and where the sale is to be held. If within twenty (20) days after the giving of such notice holders of Participation Certificates representing thirty-three and one-third per cent (33-1/3%) or more of the then outstanding Trust Units shall file with Liquidation Trustee written dissents from such proposed sale, no sale shall be made. Otherwise, Liquidation Trustee shall offer the Trust Property or part thereof covered by the notice for sale at the noticed time and place (or at the same place at a later time of which the only notice need be announcement thereof at a time and place earlier noticed) and shall sell such Trust Property or part thereof to the highest acceptable bidder upon such terms as Trust Managers may approve, provided that Trust Managers may in any event fix a premium below which the Trust Property or part thereof in question shall not be sold.

"Section 4. In the event that a sale or other disposition of the entire Trust Estate shall not have been effected prior to July 1, 1950, Liquidation Trustee shall promptly cause to be organized (at the expense of the trust estate) an appropriate corporation with such capitalization evidenced by such number of shares with or without par value as may be convenient for the purposes hereof, and shall there-

upon not later than December 31, 1950, convey and transfer to said corporation (subject to liens and charges then existing against the Trust Property and without covenants) the net Trust Property and distribute to and among the holders of the outstanding Participation Certificates said shares of stock in proportion among them as the Trust Units evidenced by the Participation Certificates respectively standing in their names bear to the total Trust Units then issued and outstanding."

In another proceeding, Victor v. Hillebrecht, 405 Ill. 264, instituted on behalf of trust unit holders, the plaintiff was represented by the same attorney as here. That suit involved the same trust agreement and property. The court held that the purchase of trust units by the trust managers did not constitute a breach of trust, and that the court could not compel the trust managers to exercise a discretion given to them by the express terms of the agreement with reference to the sale of trust property before July 1, 1950. We shall not consider questions presented in the instant case which were raised and determined in Victor v. Hillebrecht.

Plaintiff contends that section 2 of the trust agreement, which provides for the distribution of the "net trust property" among the beneficiaries, is inconsistent with section 4 which provides for a transfer of the identical property to a newly formed corporation and continues the existence of the trust. Plaintiff says that there cannot be, at the same time, a termination of the trust "in all events" on July 1, 1950, as provided in section 1 of Article X,

and the existence of the trust until December 31, 1950, as provided in section 4. In support of his position he relies on Olson v. Rossetter, 399 Ill. 232.

In the recent case of Plast v. Metropolitan Trust Company, 401 Ill. 302, the question presented was whether at or prior to the termination of the trust agreement the trustee was under a mandatory duty to sell the trust property for cash and to distribute the proceeds to the stockholders, or whether, in lieu of that, it could follow the plan of the trustee and trust managers and sell the property to a corporation in exchange for all of its stock and bonds and compel objecting holders of certificates of beneficial interest to accept the stock and bonds of the corporation. In that case, as here, the trust agreement provided that the trust "may be terminated at such time as the trust managers, in their sole discretion, may determine," and fixed the termination of the trust "in any event" within ten years. The agreement also provided that the trustee shall have full power to sell the trust property or any part thereof" to another trust or to a corporation now or hereafter organized," in exchange for certificates of beneficial interest or other securities of such corporation or trust. The trustee conveyed the trust property to a corporation in exchange for all its capital stock and income bonds. The court held that there was a sale of the trust property, within the meaning of the provisions of the trust agreement, before its expiration date.

Plaintiff argues that the present case is distinguishable from Plast v. Metropolitan Trust Co. for the reason that

the trustee in that case conveyed the trust property to the corporation prior to the termination of the trust, whereas in this case no corporation could have been created during the life of the trust. There was no provision in the trust agreement in the Plast case similar to section 4 of the agreement in the case at bar.

The rules of construction which apply to the interpretation of contracts also apply to the construction of trust instruments. See Olson v. Rossetter, 399 Ill. 232. Our courts of review have repeatedly held that in construing a written contract effect must be given to each word and term of the contract, rejecting none as meaningless, repugnant, or surplusage. (Rhomberg v. The Texas Co., 379 Ill. 430; Papulias v. Wirtz, 331 Ill. App. 376.)

We think the language and intent of section 4 is clear. In the event the trust property is not disposed of before July 1, 1950 the procedure to be followed thereafter by the trustee is prescribed by section 4. Title to the trust property remained in the trustee after July 1, 1950 and until December 1, 1950. During this period the trust remained active since there were specific duties prescribed to be performed by the trustee relating to the distribution of the trust property. See Green v. Gawne, 382 Ill. 363. In our view this is a reasonable interpretation of section 4, consistent with the provisions of section 2, and also consistent with the rest of the agreement, the general purpose of which is to make a disposition of the trust property advantageous to all of the beneficiaries.

For the reasons given, the orders appealed from, entered on July 6, 1950, are affirmed.

ORDERS AFFIRMED.

BURKE, P.J. AND KILEY, J., CONCUR.

491

491

A

45359

343 I.A. 647

BARBARA JOHNSON, Appellee, v. TRUST COMPANY OF CHICAGO, a corporation, Administrator of the Estate of RICHARD A. BARRETT, Deceased, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in the sum of $65,000 entered on the verdict of a jury in an action to recover damages for personal injuries sustained while plaintiff was riding as a guest in an automobile driven by defendant's intestate.

Defendant's motion for judgment notwithstanding the verdict and its alternative motion for a new trial were overruled.

The amended complaint, consisting of one count, charged willful and wanton misconduct. The specific acts of misconduct alleged are that defendant's intestate (a) drove the said automobile at a high and dangerous rate of speed, having regard to the traffic and use of the way; (b) failed to keep said automobile under proper control, and failed to stop said automobile when danger of collision was imminent; (c) failed to keep a proper lookout for objects and trees alongside of said highway; (d) drove said automobile with great force and violence into a tree that was directly off the west half of said highway intended

This page to be substituted

491

45359

BARBARA JOHNSON, Appellee,	APPEAL FROM
v.	SUPERIOR COURT,
TRUST COMPANY OF CHICAGO, a corporation, Administrator of the Estate of RICHARD A. BARRETT, Deceased, Appellant.	COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment in the sum of $65,000 entered on the verdict of a jury in an action to recover damages for personal injuries sustained while riding as a guest in an automobile driven by defendant's intestate.

Defendant's motion for judgment notwithstanding the verdict and its alternative motion for a new trial were overruled.

The amended complaint, consisting of one count, charged willful and wanton misconduct. The specific acts of misconduct alleged are that defendant's intestate (a) drove the said automobile at a high and dangerous rate of speed, having regard to the traffic and use of the way; (b) failed to keep said automobile under proper control, and failed to stop said automobile when danger of collision was imminent; (c) failed to keep a proper lookout for objects and trees alongside of said highway; (d) drove said automobile with great force and violence into a tree that was directly off the west half of said highway intended

for southbound traffic, although said tree was in full and plain view of the intestate of defendant, Trust Company of Chicago, and although said collision would have been avoided by the exercise of reasonable care; (e) drove said automobile while in an intoxicated condition. During the oral argument in this court plaintiff admitted that the last charge of the amended complaint (e) was withdrawn at a former trial.

Defendant answered denying the charges, and plaintiff filed a reply averring that she was free from any willful and wanton misconduct on her part which contributed to the collision.

The evidence discloses that on January 25, 1947, about 1 o'clock a.m., defendant's intestate, accompanied by plaintiff, was driving a Buick automobile on LaGrange Road, about three-quarters of a mile north of the corporate limits of the Village of LaGrange in Cook County, Illinois, when the automobile left the roadway, striking a tree located about ten feet west of the paved portion of LaGrange Road. At this point the paved roadway is about forty feet wide and runs in a northerly and southerly direction.

Frank Guetter and Thomas Maloney, members of the Sheriff's Highway Police Department of Cook County, came to the scene of the accident about twenty or twenty-five minutes after the occurrence. They found the Buick automobile involved facing in a northerly direction with the front end "locked" up against a tree. There were tire marks running in a northerly direction on the shoulder of the highway for about twenty-five feet, leading to the rear

wheels of the automobile. Defendant's intestate was slumped over the wheel and plaintiff was lying to his right in a "sliding" position with her legs pinned between the upper part of the dashboard and the front seat cushion. The motor of the automobile was driven through the fire wall against the front edge of the front seat. The dashboard was crumpled and the windshield shattered. On the morning of the occurrence the pavement was covered with a "frosty glare" and was "very slick at certain speeds."

Shortly after the accident Ralph H. Yount and Henry Cooper were driving south on LaGrange Road and when they approached the scene of the accident they observed "branches and bark of a tree" lying on the roadway. Nearby they saw the Buick automobile "up against the tree" to the right of them. The highway was "glassy as if frosty." There were tire marks on the pavement approximately two hundred feet long extending from the northbound lane and across the southbound lane to the automobile where it rested against the tree. Looking into the automobile they found the intestate "hunched up" over the steering wheel and the plaintiff lying beside him.

Dr. Louis Seno, a physician called to the scene of the accident by the LaGrange Park Police, testified that the front end of the automobile hit the tree squarely in the middle of the radiator; that upon looking into the right side of the automobile he saw plaintiff; that the bones in her legs were fractured and she was bleeding "very profusely"; that he went around the automobile and examined

defendant's intestate. Upon being asked the following question by plaintiff's counsel: "What did you observe?" the witness made the following reply: "The first thing I observed, he was bleeding very profusely about his neck. Well, I examined a little bit further and I could feel no pulse. As I got near the boy I noticed that his head was almost completely severed. And also at the same time, I had--I got the smell, the odor of alcohol around this portion of the car, and his body." Whereupon defendant's counsel moved that the answer be stricken. The trial court overruled the motion. No testimony was offered in behalf of defendant.

The principal question presented is whether there is any evidence in the record fairly tending to support the allegations of the amended complaint.

The record discloses that the trial judge indicated when entering judgment upon the verdict that he invoked the doctrine res ipsa loquitur in making his decision. That doctrine, as plaintiff's counsel concedes, has no application where, as here, the complaint charges willful and wanton negligence. (Cizek v. Union Stock Yards & Transit Co., 298 Ill. App. 545, 19 NE2 110.) To the same effect see Wood v. Shrewsbury, 117 W. Va. 569, and Winslow v. Tibbetts, 131 Me. 318.

The mere fact that an accident resulted in an injury to a person or damage to property has occurred does not authorize a presumption or inference that the defendant was negligent. (Rotche v. Buick Motor Co., 358 Ill. 507;

Huff v. I. C. R. R. Co., 362 Ill. 95; Western & Atl. R. Co. v. Henderson, 279 U. S. 639.)

Plaintiff insists that the tire marks extending across the wrong side of the road, and the severity of the impact, are evidence that the automobile driven by defendant's intestate was traveling at an excessive speed, and that these physical circumstances are sufficient evidence to establish the willful and wanton misconduct of the deceased. In Gelner v. Prather, 301 Ill. App. 224, the court held that the force of the impact of an automobile is not evidence sufficient to support the charges made. As to the tire marks it would seem to us that at best they would only tend to prove the direction in which the automobile traveled but would not explain why it did so. In Cox v. Dreher, 293, Ill. App. 323, it was argued that the length of the skid marks and other circumstances surrounding the scene of the accident were sufficient facts to indicate that the driver was traveling at an excessive rate of speed. There the court held that mere skid marks on a highway were not competent evidence of willful and wanton conduct in the operation of a car.

In Clarke v. Storchak, 384 Ill. 564, the administratrix brought suit to recover damages sustained when her husband was killed while riding as a passenger in defendant's automobile. There defendant's car struck the dirt portion of the shoulder of the highway and in attempting to get his automobile back on the pavement he lost control. The automobile swerved first to the left across the road and ran off the pavement for a considerable distance, and then

swerved to the right across the road again where it plunged through a railing to an underpass below. Plaintiff contended that during the entire time defendant did not at any time reduce the speed of the automobile, did not apply his brakes, but continued recklessly ahead so the automobile was going as fast when it completed its journey back and forth across the road as when it started, and that these facts should have been submitted to the jury upon the question of defendant's willful and wanton conduct. The court said, page 581: "The question as to just what caused the car to take a sudden turn to the left after it ran off the highway is uncertain. * * * Certainly it could not be said that, under the circumstances as shown here, his act in losing control of the operation of the automobile was an intentional disregard of a known duty necessary to the safety of the person or property of another and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences or that, in doing the act or failing to act, he was conscious of his conduct, and, though having no intent to injure, was conscious, from his knowledge of the surrounding circumstances and conditions, that his conduct would naturally and probably result in injury." To the same effect see Bartolucci v. Falleti, 382 Ill. 168.

In the instant case there is no evidence tending to show what caused the automobile to take the course it did and strike a tree. It may have been due to some mechanical failure of the automobile, the slippery pavement, defendant's intestate's attempting to avoid other

vehicular traffic, interference by plaintiff with the driver, or other causes, all of which are left to speculation.

In considering defendant's motion for a judgment notwithstanding the verdict, we assume, without deciding, that the testimony of Dr. Seno that he got the oder of alcohol "around this portion of the car and his body," is competent.

From a careful examination of the record we think the evidence, construed most favorably to plaintiff, together with all reasonable inferences arising therefrom, does not fairly tend to support the allegations of the amended complaint.

In the view which we take of this case it is unnecessary to consider the other points raised by the defendant, such as the giving to the jury of plaintiff's instructions 1, and 2, and the contention that the verdict of the jury is excessive.

For the reasons given, the judgment is reversed, and the cause remanded with directions to enter judgment, notwithstanding the verdict, for defendant and against plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, P.J. AND KILEY, J., CONCUR.

(3) A

45380

STANTON ROSE, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
FRED PLOTKE, Appellant.	)	OF CHICAGO.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $34,400, entered on the verdict of the jury in plaintiff's action on a promissory note for that sum, with interest at 1½ per cent per annum payable monthly, executed by defendant May 1, 1941, payable December 1, 1949 to plaintiff, executor of the estate of Grace Rose, deceased.

Defendant, a lawyer, has been in the real estate mortgage business 58 years. Grace Rose was the mother of plaintiff and a sister-in-law of defendant. In December 1917 she began investing in mortgages through defendant. He took up all mortgages in default and paid or credited her with the face amount of each mortgage. On November 1, 1931 she had a total credit of $39,423.36. Defendant executed his note for that sum, payable to her ten years thereafter with interest at 5 per cent. December 8, 1939 she purchased another mortgage from defendant. The price of the mortgage—$5,023.36— was credited on the note, reducing the principal to $34,400. The indorsement further recited the payment of interest to and including December 1, 1939, and the reduction of future interest to 2½ per cent.

Grace Rose died testate March 21, 1941, leaving plaintiff her only heir and legatee. The note was inventoried as an asset of the estate. On May 1, 1941 defendant signed and delivered the note in suit and received the first note, indorsed "Cancelled by renewal 5/1/41. Stanton C. Rose, Executor." Plaintiff received this note as part of his distributive share of the estate. Defendant paid interest each month, to and including April 1, 1949. He pleaded want of consideration and contends the court erred in instructing the jury that he had the burden of proving this defense by the preponderance of the evidence. This contention cannot be sustained. The burden of proving want of consideration is upon the defendant asserting it. American National Bank v. Woolard, 342 Ill. 148; Weiland v. Weiland, 297 Ill. App. 239; In re Estate of Brauns, 330 Ill. App. 322.

Defendant also contends that the verdict is against the manifest weight of the evidence. Although plaintiff and defendant are not blood relatives, there is evidence that plaintiff's mother lived in defendant's home for many years and that plaintiff called the defendant "uncle". The evidence reveals facts indicating a family quarrel, but these need not be detailed. The jury and the trial judge saw and heard the witnesses and were in a better position to judge of their credibility than is this court. They chose to believe plaintiff and his witnesses. The evidence shows that defendant paid interest on the two notes for more than 17 years. He appeared at the hearing to assess the value

of the first note for inheritance tax purposes, acknowledged his ability to pay the note and made no statement derogatory of its validity. We cannot say the verdict is against the manifest weight of the evidence.

The judgment is affirmed.

AFFIRMED.

Feinberg and Tuohy, JJ., concur.

10

1

45177

JEAN COREY, Appellant, v. CLIFFORD COREY, Appellee.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This proceeding arises from a divorce action in which a decree was entered July 2, 1948, in favor of plaintiff. The decree, based upon an agreement of the parties, ordered defendant to pay plaintiff the sum of $2340.00, in weekly instalments of $15.00. December 12, 1949, plaintiff filed a petition for a rule on defendant to show cause why he should not be held in contempt for refusal to make the weekly payments after her remarriage September 30, 1949. After defendant answered the chancellor ordered the petition dismissed and the decree modified so as to relieve defendant of payments accruing after the date of plaintiff's remarriage. Plaintiff has appealed from this order.

It is undisputed that payments according to the terms of the decree were made in full up to the date of plaintiff's remarriage. Defendant's denial of liability for payments thereafter is predicated upon the theory that plaintiff's remarriage barred her from further payments under section 18 of the Divorce Act as amended in July 1949 (Chap. 40, Par. 19, Ill. Rev. Stat. 1949). As amended that section provides that a party should not be entitled to alimony and

maintenance after remarriage, but should be entitled to receive unpaid instalments of any settlement in lieu of alimony.

The chancellor construed the decree as providing weekly payments "for support and maintenance only" and decided that the plaintiff's remarriage terminated the necessity for continuance of, and relieved the defendant of the obligation to make, any further payments. He considered it unnecessary to pass on the question of the effective date of the 1949 amendment of section 18 of the Divorce Act since he thought the amendment worked no change as to provisions for payments of this nature.

The agreement of the parties expressly provided that plaintiff be "forever barred from all claims to alimony"; that she be sole owner of the household furniture and "certain real estate on 79th Street"; that "as and for a further property settlement and in lieu of alimony" defendant pay plaintiff $2340.00, in weekly instalments of $15.00; and that each party be forever barred from claiming against the other dower, homestead, etc.

The basic question on appeal is whether the chancellor correctly construed the decretal provision for the payments to be made by defendant.

Since the entry of the order appealed from, the case of Walters v. Walters, 341 Ill. App. 561, has been decided by this Court and has recently been affirmed by the Supreme Court. Walters v. Walters, Docket No. 31874. We

think the agreement here involved is substantially similar to the one construed in the Walters case. The Walters agreement was held to be a property settlement and not a provision for alimony. The decretal provisions of the instant decree meet the tests of a property settlement laid down by this Court, (Walters v. Walters, 341 Ill. App. 561) and is plainly not within the rule describing alimony announced by the Supreme Court. Walters v. Walters, Docket No. 31874. Plaintiff therefore had a vested interest upon the entry of the decree. It follows that the chancellor erroneously construed the instant agreement to be one "for support and maintenance only". The order modifying the decree in the light of that construction is erroneous. We think it is unnecessary to consider any other point.

For the reasons given the order entered January 20, 1950, is reversed and the cause is remanded with directions to enter an order granting the relief prayed in the petition.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

LEWE, J., CONCURS.

FEINBERG, J., TOOK NO PART.

12

A

45423

MAE K. MADDEN, Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT
CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdict and judgment for $5,000.00 in plaintiff's favor. Defendant has appealed.

The accident occurred April 10, 1946, about 8 A.M., at 67th Street and Ashland Avenue, Chicago. Plaintiff at the time was a school teacher, about 43 years of age. She had boarded a northbound Ashland Avenue streetcar at 91st Street, having arranged to meet friends at the northwest corner of the 67th Street intersection. As the car approached 67th Street she walked to the front platform. The car stopped and she began to alight. There is a dispute in the testimony as to when or how she fell or was thrown to the safety island. She suffered a fractured heel bone in her right foot.

The ultimate issues submitted to the jury under the pleadings were whether plaintiff was in the exercise of due care and whether defendant was negligent in (a) operation of the streetcar, (b) in failing to have the car under safe control, and (c) in causing it to jerk suddenly without notice to plaintiff. In addition to the general

verdict the jury answered in the affirmative an interrogatory whether the streetcar moved while plaintiff was stepping from the platform to the safety island.

The questions on appeal are whether the general and special verdicts are against the manifest weight of the evidence; whether the damages are excessive; and whether the court erred in giving and refusing instructions.

Plaintiff testified that she was wearing medium-heeled walking shoes; that she was facing east, holding the south grab handle with her right hand and her purse in her left hand; that the streetcar stopped and she prepared to alight; that she placed her right foot on the step, lifted her left foot from the car platform to place it down on the safety island; and that the streetcar then jerked forward, turning her southward and throwing her to the safety island. Defendant's four witnesses denied that the car moved or jerked forward, after it had stopped, until after the accident had happened. This issue was vital. The only charge of negligence, pertinent under the evidence, was the operation of the car so as to cause it to jerk forward suddenly without notice to plaintiff. The special verdict was in plaintiff's favor on this issue.

Plaintiff was the only witness in support of her case. Two of defendant's four witnesses were the motorman and the conductor. Neither saw the plaintiff fall. Defendant's other two witnesses were passengers, standing on the front platform of the streetcar. One of these, Klein,

said plaintiff fell when the heel of her left shoe caught on the platform. The other witness, Schmeski, gave a different version. He said plaintiff fell after she was off, and clear of, the car and on the safety island. "She kind of turned toward the south, and all of a sudden she fell down * * *". This witness's lack of observation at the time; the lack of corroboration of his version of the accident, and the improbability that plaintiff would suddenly fall on the safety island on the bright, clear, April day, seriously discredit this witness's version.

We think Mareno v. Chicago Transit Authority, 342 Ill. App. 443, decided by this Court, is close to the instant case on the facts. It is not on all fours, however, because there was no element of factual probability there which corroborated Genevieve Mareno's version of the accident. Plaintiff here, after the accident, was prone on the safety island, her head to the south, her feet to the north, with part of her body south of the car step. It seems more probable that, with her right foot on the step and her left foot in the space between the platform and the surface of the safety island, and her right hand holding the south grab handle, a sudden forward jerk, twisting plaintiff, would throw her into this position than that catching the heel of her left shoe on the platform step would do so. This twisting of her body could cause the fracture of her right heel bone.

We disagree with plaintiff as to the probable consequences of the heel of her left shoe catching on the platform. Since she held the grab handle with her right hand, her downward course could be pulled to the south. It is still more likely, however, that her position on the safety island would be substantially different. Her injuries would probably be different depending upon just when she "let go" of the grab handle. Klein testified that he was looking down from his six feet two inches of height as he waited directly behind plaintiff at the car door. He said she wore "cuban heels" which are "below a dress heel and above a walking heel" and that he was positive her shoes were white. Plaintiff argues the improbability of this testimony given at a trial in 1951 of an accident in 1946, and that it is unlikely that plaintiff, a school teacher, would be wearing white shoes with "cuban heels" to work in April. Plaintiff said that she wore brown walking shoes. The shoes were introduced in evidence but are not in the record transmitted to us.

We think that the jury was not bound to disbelieve plaintiff's, and accept Klein's, version of the accident because defendant's four witnesses testified in direct contradiction of plaintiff on the question of the cause of her fall. We think the element of probability arising from the plaintiff's position after the accident brings this case under Stein v. Cummings et al., 319 Ill. App. 646, and distinguishes Mareno v. Chicago Transit Authority, 343 Ill. App. 443. We think the verdicts are not against the manifest weight of the evidence.

Plaintiff's doctor bill was $200. She lost about $550 in wages. The heel bone is one of the bones making up the tripod, of the foot, used in walking. Four years after the accident plaintiff's foot was "severely" swollen and "slightly" discolored. Her medical witness said the condition is permanent; that she will probably have trouble walking, have pain and swelling and discoloration "sometimes"; and that she will be inconvenienced. Defendant produced no medical testimony though its doctor examined plaintiff after the accident and before the trial. Plaintiff said that sometimes, at the end of the day, her foot is "more swollen" around the heel and ankle, and that in housework she must relieve the pain by standing on her left foot. The amount of the damages is not shocking under these circumstances and we conclude the damages are not excessive.

Defendant complains of the giving of plaintiff's instruction No. 11. This instruction was upon the elements to be considered in deciding the question of damages. The complaint is that one of these elements was "such future loss of time and inability to work, if any, which the jury may believe from the evidence she will sustain on account of such injuries". Defendant argues that there is no evidence that plaintiff lost one day of work during the four year interim between the accident and the trial, nor any evidence that she would lose time or wages in the future because of the accident. It claims that the instruction

virtually told the jury there was evidence to support that element of damages. There was evidence of discoloration and swelling shortly before trial, "more swelling" in the evening after the day's work, need of relieving pain during housework in the evening, and the doctor's opinion of permanence of the injury and future trouble, pain and inconvenience. We think this testimony bears sufficiently on the element questioned to justify its inclusion in the instruction. There was no error in giving the instruction.

Complaint is also made of the refusal to give defendant's tendered instruction No. 1. This instruction told the jury that if it believed from the evidence that the streetcar door was opened at the time and place of the "occurrence herein", but before the car came to its regular stop, the opening of the door "at the time and place" was not negligence. Plaintiff testified to statements to her by the motorman with reference to premature opening of the door. The charge in the complaint based upon the premature opening of the door was stricken at the close of plaintiff's case. We think defendant's given instructions Nos. 13 and 17 and the interrogatory narrowed the jury's attention to the one fact issue involved so as to eliminate the prejudice which defendant might otherwise have suffered. The refused instruction had no place in the case and the court did not commit error in refusing to give the instruction.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE, J. CONCURS.

FEINBERG, J., TOOK NO PART.

G A

45158

CLAIRE BORIN, Plaintiff, v. NATHAN BORIN, Defendant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
IRVING EISENMAN, EMMETT F. BYRNE and WILLIAM L. KELLEY, Appellees, v. NATHAN BORIN, Appellant.	343 I.A. 649
APPEAL OF NATHAN BORIN, Respondent below.	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Two orders are involved in this case, one denying a motion to quash an execution issued upon an order for payment of attorneys' fees, and the other directing issuance of an attachment against defendant for failure to pay. These proceedings stem from a divorce decree which was reversed by this court and suit dismissed in November, 1948. (Borin v. Borin, 335 Ill. App. 450.) The prior history of the case can be found in that opinion. Part of it is pertinent to the issues here involved. After a period of stormy litigation, the case was set down for hearing as an uncontested matter on January 27, 1948. Testimony was then presented by plaintiff of alleged desertion. A disagreement arose concerning custody of the child, and plaintiff stated she had not understood the situation as it was revealed to her. The court announced, however, that it would enter a decree

and the case was continued.

Plaintiff engaged other counsel and on February 5, 1948, so notified her old counsel. On the same day her new attorney A. C. Lewis notified opposing counsel that on the convening of court on February 6th he would move to dismiss the suit. When the case came up for hearing, an order was entered substituting Lewis for Eisenman as attorney for plaintiff. Plaintiff's motion to dismiss her suit was denied and the court entered a decree finding defendant guilty of desertion. An order was then entered "on motion of the court * * *" that the defendant pay Messrs. Byrne and Kelley "attorneys heretofore of record for Plaintiff * * * $1000 * * *" for services up to the date of their substitution by Eisenman, and that Eisenman be paid $1500 for services up to the date of the entry of the order, the court retaining jurisdiction for the purpose of enforcing its orders with reference to attorneys' fees. On February 19, 1948, Eisenman petitioned the court for an order requiring defendant to show cause why he should not be held in contempt for failure to comply with the order. On February 19, 1948 the court entered the rule and on March 15th defendant answered, challenging the right of Eisenman to appear and the right of plaintiff to recover attorneys' fees. The matter was continued from time to time and on May 18th was continued generally until the appeal pending in the Appellate court should be disposed of.

The appeal from the decree was disposed of in

Borin v. Borin, supra. It was there decided that the court should have allowed plaintiff's motion to dismiss her suit. That was a final adjudication and cannot now be attacked. Therefore, the case comes squarely within the principle that orders for payment of fees in a divorce case cannot be made after a motion to dismiss has been or should have been allowed. Watson v. Watson, 335 Ill. App. 637; Labanauskas v. Labanauskas, 228 Ill. App. 273; Anderson v. Steger, 173 Ill. 112; Mayer v. Mayer, 320 Ill. App. 588, 590; 17 Am. Jur. 573.

Appellees seek to distinguish these cases on grounds which might have some persuasion if public policy were not involved. In divorce cases, however, the principle rests on reasons of public policy which have been reiterated many times. The allowance of such fees is for the wife who is primarily obligated for payment of fees, and the purpose of the allowance is to enable her when in need to prosecute or defend the suit. The allowance must always be made at her behest, and while the present statute (Ill. Rev. Stats. (1949), ch. 40, sec. 16) contemplates that payment may be made directly to the attorneys instead of passing through the wife, the fundamental basis for payment has not been changed. The amendment did not give the attorneys an interest in the litigation to be prosecuted on their own account. When plaintiff moved to dismiss her case, she thereby abandoned any petition or motion by her for such fees, and that motion could not thereafter be prosecuted by her attorneys.

It is urged by appellees that the rule has been generally applied in cases where a reconciliation has been effected. The principle is, however, so firmly imbedded in law that no exceptions have as yet been made. A plaintiff may wish to dismiss her divorce suit in the hope of a reconciliation or because she wishes to avoid the finality of a decree breaking family ties, or for a multitude of reasons, emotional or rational, which affect the conduct of litigants in cases of this character. In any event, the courts of Illinois have persistently held that when such a motion is made, it should be allowed.

Appellees argue that the validity of the divorce decree and the order for attorneys' fees cannot be reviewed in this case. Formerly, an appeal was limited to error in the order appealed from. Writ of error was the remedy by which the court might review the entire record. Since the passage of the Civil Practice Act (sec. 74 (1)), the entire record is open for review on appeal as was the practice under writs of error. Bride v. Stormer, 368 Ill. 524, 528; Drummer Creek Drain. Dist. v. Roth, 244 Ill. 68.

In the light of the decision of this court in Borin v. Borin, supra, the proceedings which followed denial of plaintiff's motion to dismiss constitute the prosecution of civil litigation without a plaintiff and without a res. The court had nothing before it. The order for payment of fees was invalid; all subsequent proceedings for its enforcement should have been discontinued

after the decision in Borin v. Borin, supra.

Appellees argue that any question on the execution is now moot because it was returned nulla bona at the end of 90 days and is "completely functus officio." Counsel for appellants point out that such an execution could be a lien upon real estate. Holding as we do that the order for attorneys' fees was not valid, the execution must likewise be held invalid.

Appellees argue that the order for attachment of defendant is not a final order and therefore not appealable. The reason for the rule which does not allow appeals from interlocutory orders is that a reviewing court should not be required to hear fragments of a case. In this case the appeal presents an issue which is fundamental and conclusive.

The orders appealed from are reversed and the cause is remanded with directions to quash the execution and dismiss and discharge the contempt rule.

Orders reversed and cause
remanded with directions.

Tuohy, P. J., and Robson, J., concur.